WHEN PRIVACY ALMOST WON: *TIME, INC. V. HILL*

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INTRODUCTION

In 1952, a family of seven, the James Hill family, was held hostage by escaped convicts in their home in suburban Whitemarsh, Pennsylvania. The family was trapped for nineteen hours by three fugitives who treated them politely, made gracious chitchat with them, befriended the children, took their clothes and car, and left them unharmed. For a few weeks, the Hills were the subjects of international media coverage. Public interest eventually died out, and the Hills went back to their ordinary, obscure lives.

A year and a half later, Joseph Hayes published *The Desperate Hours*, a "true crime" thriller about a family held hostage in their home by three escaped convicts. *The Desperate Hours* was based loosely on the Hills' story but substantially leavened by Hayes' imagination. The novel is filled with violence and suspense; the family is subjected to abuse, the daughter is sexually threatened, and the father attempts a daring rescue. The book became a bestseller and was made into an award-winning Broadway play, and later a major Hollywood film.

In 1955, three years after the hostage incident, *Life* magazine ran a story on the opening of the play. The article falsely described the play as a "reenactment" of the Hill family's experience.[1] *Life* used the Hills' name and a picture of their home to give the piece a "newsy" tie to a "real life" crime. The family was devastated by this unwanted, false, and embarrassing public exposure, and they successfully sued for invasion of privacy in the New York courts. *Life*'s publisher, Time, Inc. appealed to the U.S. Supreme Court in 1965, arguing that the judgment violated the First Amendment. The lawyer for the Hills was the former Vice President Richard Nixon, who had left politics and

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1 *True Crime Inspires Tense Play*, LIFE, Feb. 28, 1955, at 75.

was in private legal practice at the time.[2] It was the only case Nixon argued before the Supreme Court.

In *Time, Inc. v. Hill*, the Supreme Court for the first time addressed the conflict between the right to privacy and freedom of the press. The Court constitutionalized tort liability for invasion of privacy, acknowledging that it raised First Amendment issues and must be governed by constitutional standards. *Hill* substantially diminished privacy rights; today it is difficult if not impossible to recover against the press for the publication of nondefamatory private facts.

The *Hill* case represented the culmination of a longstanding tension in American law and culture. Since the early twentieth century, states had recognized a "right to privacy" that permitted the victims of unwanted, embarrassing media publicity to recover damages for emotional distress. The privacy tort was praised for offering protection against an exploitative press, and at the same time decried by the publishing industry as an infringement on its freedoms. In the 1950s and 60s, with the growth of the media, an increase in privacy actions, and large judgments against the press, the privacy-free press conflict raised contentious debate.

Privacy and free speech were charged issues in American culture more generally. In an era that saw the introduction of computers, large-scale data collection, and increasing government surveillance, "privacy" emerged as a major national focus. Free expression rights also assumed new meaning and urgency in the turbulent social climate of the postwar era. These concerns were reflected in the Supreme Court's decisions of this time. In *New York Times v. Sullivan*, the most far-reaching First Amendment decision of the twentieth century, the Court held that the press had an expansive right to report on the public conduct of public officials, including a right to publish falsehoods, unless they were made with "reckless disregard" of the truth.[3] One year later, in *Griswold v. Connecticut*, the Court declared a constitutional "right to privacy," protected by "penumbras" and "emanations" of guarantees in the Bill of Rights.[4]

Time, Inc. v. Hill cast these freedoms in opposition. The case called upon the Warren Court, the Court that decided *Sullivan* and *Griswold*, to reconcile the two constitutional rights it had championed and created. A majority led by Justices Earl Warren and Abe Fortas initially voted to uphold the Hills' claim. The Hills' constitutional

2 Time, Inc. v. Hill, 385 U.S. 374, 375 (1967).

3 New York Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964).

4 Griswold v. Connecticut, 381 U.S. 479, 483–85 (1965).

"right to be let alone" outweighed Time, Inc.'s right to publish. But after a bitter fight, votes switched, and a narrow majority voted for Time, Inc. In an opinion by Justice William Brennan, the Court rejected the notion of a constitutional right against unwanted publicity and declared an expansive view of the First Amendment as protection for all newsworthy material. The right of the press to publish on "matters of public interest," from political reporting to articles about Broadway plays to movies and comic books, outweighed the privacy interests of unwilling subjects of media publicity.

Drawing on previously unexplored and unpublished archival papers of Richard Nixon and the Justices of the Warren Court, this Article tells the story of this seminal constitutional law case, the Supreme Court's first attempt to negotiate privacy rights and freedom of the press.[5] It tells the story of how privacy almost won; how the Supreme Court almost recognized a constitutional right to privacy against the press—and why it didn't. *Time, Inc. v. Hill* marked a crossroads, a moment when the law could have gone in one of two directions: towards privacy and a measure of press restraint, or towards a freer—if not at times unruly and uncivil—marketplace of ideas. The Court chose the latter, and we have lived with the consequences since.

Part I describes the factual background to the case, which pitted an ordinary middle-class family against Time, Inc., the nation's most powerful and prestigious publishing empire. Part II examines the legal backdrop—the history of tort privacy law between 1900 and the 1950, the privacy-free press conflict, and the growth in privacy litigation after the Second World War. Part III details the initial stages of the *Hill* litigation, and Time, Inc.'s decision to turn the lawsuit into a

5 *Time, Inc. v. Hill* is a standard in First Amendment casebooks, but very little has been written about its history and significance. The most thorough chronicler of the case was Leonard Garment, the lawyer for the Hills. *See* LEONARD GARMENT, CRAZY RHYTHM: MY JOURNEY FROM BROOKLYN, JAZZ, AND WALL STREET TO NIXON'S WHITE HOUSE, WATERGATE, AND BEYOND 79–97 (1997) (describing the author's experience as plaintiff's counsel); Leonard Garment, *The Hill Case*, THE NEW YORKER, Apr. 17, 1989, at 90–91, 94 (detailing Richard Nixon's interest in arguing the appeal before the Supreme Court). The law professor and Supreme Court historian Bernard Schwartz also had a short essay on the case, and the *New York Times* journalist Anthony Lewis included the story of the case in his book on the aftermath of the *New York Times v. Sullivan* decision. *See* BERNARD SCHWARTZ, SUPER CHIEF: EARL WARREN AND HIS SUPREME COURT—A JUDICIAL BIOGRAPHY 642–48 (1983) [hereinafter SUPER CHIEF]; BERNARD SCHWARTZ, THE UNPUBLISHED OPINIONS OF THE WARREN COURT 240–303 (1985) [hereinafter UNPUBLISHED OPINIONS]; *see also* LEE LEVINE & STEPHEN WERMIEL, THE PROGENY: JUSTICE WILLIAM J. BRENNAN'S FIGHT TO PRESERVE THE LEGACY OF *New York Times v. Sullivan* 55–64 (2014) (illustrating how the Hill decision relied on the Sullivan framework); ANTHONY LEWIS, MAKE NO LAW: THE SULLIVAN CASE AND THE FIRST AMENDMENT 184–190 (1991) ("*Time, Inc. v. Hill* proved to be the occasion for the next large step by the Court in applying the *Sullivan* rule.").

test case that would for the first time subject the privacy tort to constitutional scrutiny. Part IV explains the cultural forces that made privacy and free speech contested issues in the 1950s and 60s. As Part V suggests, *Sullivan* and *Griswold* were outgrowths of popular concerns with free speech and privacy, and they elevated the issues in the *Hill* case to a constitutional plane.

Using material from Richard Nixon's presidential archives, Part VI describes Time, Inc.'s appeal, and the efforts of the lawyers in the case to mobilize *Griswold* and *Sullivan* on behalf of their respective positions. While Time, Inc.'s attorneys asked the Court to apply *Sullivan*'s "reckless disregard" standard, Nixon tried to invoke *Griswold*'s right to privacy. *Griswold* was valid precedent for *Hill*, Nixon argued, because it recognized that the Bill of Rights protects personal privacy.[6]

Part VII, based on the Justices' archival papers, reveals the debate in *Hill*. Endorsing Nixon's position, Justice Fortas, writing for the majority, argued that the Hills had a constitutional right to be free from unwanted and injurious media publicity. Had the Fortas opinion ultimately come down as law, there would have been a right to privacy against the press on par with Fourth Amendment privacy. The opinion was so bitter in its denunciation of the press that it produced a revolt led by Hugo Black, a champion of First Amendment absolutism and a personal enemy of Fortas. The consequence was a reversal of votes and a decision in favor of Time, Inc. The new majority opinion by Justice Brennan rejected the Hills' privacy argument and proclaimed Time, Inc.'s right to publish on a broad range of newsworthy material, even if personal privacy was sacrificed in the process. It was one of the most capacious visions of freedom of the press in the Court's history to that time.

Part VIII addresses *Time, Inc. v. Hill*'s enduring consequences. Coming down at a time of heightened sensitivity to privacy, and in an era of press criticism, the controversial and widely publicized decision became a popular referendum on privacy and the press. While the media celebrated Brennan, Nixon prevailed in the court of public opinion. Americans had come to see the Warren Court as a defender of personal privacy; *Hill* failed that expectation and left many feeling disappointed and betrayed. By largely freeing the press from tort liability for invasion of privacy, *Hill* emboldened it to delve deeper into personal affairs and private lives. In dismissing the Hills' privacy argument, the decision foreclosed a possibility that would have surely

6 Jurisdictional Statement at 14–15, Time, Inc. v. Hill, 385 U.S. 374 (1967).

transformed the fate of American publishing, politics, and public discourse.

There was another significant result of the case. Nixon's work on the *Hill* case may have helped him gain confidence to embark on a presidential bid in 1968. Contemplating a return to politics, he used his representation of the Hills to enhance his public image—to promote himself as a principled defender of Americans' besieged privacy rights. *Time, Inc. v. Hill* was part of the political rebirth of Richard Nixon.

PART I: INVASION OF PRIVACY

A. The Hill Incident

In the early morning hours of September 10, 1952, Joseph Wayne Nolen, his brother Ballard, and Elmer Schuer sawed through the window bars of the second floor cell they shared at the Northeastern Federal Penitentiary in Lewisburg, Pennsylvania. Using a rope made of towels, they lowered themselves to the prison yard, then scaled the walls with a crude metal ladder fashioned out of pipes they'd hidden in the yard. The fugitives stole a car and went to nearby Philadelphia, hoping to find a comfortable suburban home to break into and occupy while they ate, rested, and planned their next move.[7]

James and Elizabeth Hill lived with their five children in the affluent suburb of Whitemarsh.[8] Around 8:15 AM on September 11, Joe Nolen knocked at the back door and Elizabeth Hill answered it. "We're not going to hurt you—we just want your house for a day. If you do what we tell you, nobody will be hurt," he said. As he forced open the door, Ballard, Nolen and Schuer appeared with shotguns.[9] Elizabeth was taken to a second floor bedroom and locked in with her three sons. The family's two teenage daughters and the father, James, were not home at the time, but they returned to find the children and Elizabeth in captivity.[10]

Described by the federal judges who sentenced them as "desperate" and "potential murderers," the Nolen brothers and Elmer Schuer were shrewd, experienced criminals. They were also strange-

7 *3 Escaped Convicts Seize Family, Hold Home 19 Hours to Elude Hunt*, N.Y. TIMES, Sept. 13, 1952, at 1.

8 Transcript of Record at 22, Hill v. Hayes, 15 N.Y.2d 986 (1965) [hereinafter Transcript of Record, Hill v. Hayes].

9 *House Party*, TIME, Sept. 22, 1952; Transcript of Record, Hill v. Hayes, *supra* note 8, at 24.

10 *Three Prison Fugitives Hold Family Captive*, PHILA. BULL., Sept. 13, 1952.

ly, unusually polite. They used no profanity and were courteous and respectful to the Hills. They offered to play games with the children and to teach the boys to shoot. They were so well-mannered that they even apologized for interrupting a conversation. They were, in Elizabeth's words, "perfect gentlemen."[11] Around 3:00 AM the following morning, the convicts finally left the house in the Hills' car.

Like so many victims of crime, the Hills were catapulted into the media spotlight. Almost all of the national newspapers covered the incident. The *Chicago Tribune* featured a huge headline: ESCAPED FELONS IMPRISON FAMILY HOSTAGE 19 HOURS. 3 PRISON FUGITIVES HOLD FAMILY CAPTIVE 19 HOURS IN WHITEMARSH HOME announced the *Philadelphia Bulletin*. Articles described the Hills' home, the well-dressed family, the make and model of the family's cars, and where the kids went to school. The location of the house was carefully described; the papers may well have given out the address. The Hills were deeply disturbed by the publicity, which lasted for several months. By the spring of 1953, when the Hills had moved from Whitemarsh to Stamford, Connecticut, the media attention had finally died out.[12]

B. The Desperate Hours

In 1953, Joseph Hayes was a struggling thirty-five-year-old freelance author.[13] Hayes wrote scripts for radio and television as well as articles for national magazines. In 1946, he had sold an article to a magazine about a family held hostage by criminals. This marked the beginning of his interest in what he called the "hostage theme."[14]

Every time newspapers reported on a hostage incident, Hayes clipped the story and put it into a file folder. By the early 1950s, the file was thick. It included articles on an incident in which a burglar in Omaha held a woman hostage after he broke into her home.[15] In California, three convicts went into the home of a family and forced the father, at gunpoint, to go into town and buy a car. There were many others. The Hills' story captured Hayes's attention, and he put the article from the *New York Times* into his file.[16]

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11 *Wife Describes 19 Hour Captivity*, PHILA. BULL., Sept. 14, 1952.

12 Transcript of Record, Hill v. Hayes, *supra* note 8, at 44, 51.

13 *See* RAY BANTA, INDIANA'S LAUGHMAKERS 83–84 (1990); Campbell Robertson, *Joseph Hayes, 88; Wrote 'The Desperate Hours,'* N.Y. TIMES, Sept. 20, 2006, at C13.

14 Transcript of Record, Hill v. Hayes, *supra* note 8, at 85–87, 97.

15 *Burglar Terrorizes 2 Bellevue Families*, OMAHA MORNING WORLD, Oct. 2, 1947.

16 Transcript of Record, Hill v. Hayes, *supra* note 8, at 86–87, 100.

In the spring of 1953, Hayes had begun planning for a novel about a family held hostage by escaped convicts. Using his clipping file for inspiration, Hayes wrote the work that became *The Desperate Hours*. The book was published by Random House in March 1954. Within three weeks it landed on the bestseller list, and it stayed there for sixteen weeks. It was also serialized in *Collier's* magazine, excerpted in the *Readers' Digest*, and published as a paperback by Pocket Books. *The Desperate Hours* was lauded as the "hottest literary property" of 1954.[17]

The novel begins in the early dawn hours outside a federal penitentiary near Indianapolis. Three prisoners—Glenn Griffin, his brother Hank, and a third man, Robish—have just made a successful break. Their plan was to hide out in a suburban home, selected at random. The convicts choose the home of the "Hilliard" family, in a clean, peaceful, affluent suburb. The fugitives arrive at the Hilliard home at 8:30 AM in the morning on a late summer day. The convicts enter the house at gunpoint and entrap the mother; the daughter, son, and father return home later in the day to find Mrs. Hilliard in captivity.[18]

The similarities between the Hills and the Hilliards are obvious, yet there were important differences. Unlike the polite fugitives at Whitemarsh, the convicts in the novel are vulgar, profane and threatening. "Take it easy lady. You open your mouth, the little kid who owns the bike out front'll come home from school and find your body," Glenn Griffin says to the mother. Though James Hill, in real life, was unharmed, the father in the story, Dan Hilliard, is beaten into unconsciousness. The novel is laden with violence and sexual innuendo; one of the convicts drunkenly paws the teenage daughter Cindy and threatens to assault her. Despite these abuses, the family deals with their captors with dignity and poise.[19]

In publicity pieces he wrote for the book, Hayes described the story as an amalgam of fact and fiction, based on actual hostage incidents but largely the product of his own imagination. In an article titled "Fiction Out of Fact" that appeared in the Sunday *New York Times*, Hayes explained:

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17 *Id.*

18 JOSEPH HAYES, THE DESPERATE HOURS 145–51 (1955).

19 The book received many positive reviews. *See* Richard Coe, *Still Exciting, Those Hours*, WASH. POST, Nov. 10, 1955, at 38; Sterling North, *Desperate Fugitive Trio Holds Family in Suspense*, WASH. POST, Apr. 18, 1954, at B7; Orville Prescott, *Books of the Times*, N.Y. TIMES, Mar. 3, 1954, at 25.

"In California, in New York State, in Detroit, in Philadelphia, frightened and dangerous men entered houses [and] held families captive in their own homes." "[W]hat of the personal stories involved? What are the thoughts and emotions of the guards' waiting relatives? And what of the inner struggles of the convicts themselves?" *The Desperate Hours* sprang from "conjectures such as these."[20]

In the spring of 1954, Hayes signed a deal with the Paramount Studio to make *The Desperate Hours* into a movie.[21] Hayes also made plans to turn the book into a play.[22] The theatrical version of *The Desperate Hours* opened in New York and Philadelphia in early 1955. The film opened in October 1955, starring Humphrey Bogart.[23]

The Hills were outraged by *The Desperate Hours*. Cruelly, they were confronted with memories they had worked hard to put behind them. James's friends talked about *The Desperate Hours*, and the children were teased.[24] Every time someone asked him about *The Desperate Hours*, James told them that the story had nothing to do with his experience. "My family was not subjected to any violence. They were not subjected to that type of language . . . not subjected to the possibility of the women being violated."[25]

Elizabeth Hill became severely depressed. She was humiliated and self-conscious; she felt as if she were being talked about and whispered about wherever she went. She was descending into a psychiatric breakdown—in the words of her lawyers, a "gradual retreat from community and family life, and the onset of an acute psychotic disability."[26] Things worsened in February 1955, when *Life*, the nation's most popular newsmagazine, with a circulation of six million, ran a photo essay that described the Hills—by name—as the family in *The Desperate Hours*.

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20 *Fiction Out of Fact*, N.Y. TIMES, Jan. 30, 1955, sec. 2, at 1.

21 Thomas M. Pryor, *New Hayes Novel Interests Bogart*, N.Y. TIMES, May 19, 1954, at 36; Bob Thomas, *Sickness of Son Directed Writer to Fame's Door*, BATON ROUGE ADVOC., Aug. 31, 1954,at 3-A.

22 Louis Calta, *Broadway Drama for Montgomery*, N.Y. TIMES, June 19, 1954, at 9.

23 MICHAEL ANDEREGG, WILLIAM WYLER 184 (1979); STEFAN KANFER, TOUGH WITHOUT A GUN 204 (2011); GABRIEL MILLER, WILLIAM WYLER: THE LIFE AND FILMS OF HOLLYWOOD'S MOST CELEBRATED DIRECTOR 320 (2013); Hollis Alpert, *Desperate Hours*, SATURDAY REVIEW, Oct. 22, 1955, at 30; John McCarten, *The Current Cinema*, THE NEW YORKER, Oct. 15, 1955 at 182–83.

24 Brief of Appellant at 12, Hill v. Hayes, 15 N.Y.2d. 986 (1965).

25 *Id.* at 46.

26 Transcript of Record, Hill v. Hayes, *supra* note 8, at 483.

C. The Article

In the 1950s, *Life* was America's most popular magazine. *Life* was part of Henry Luce's Time, Inc. media empire, the most prestigious and influential publishing company of the era; Time, Inc.'s major publications included *Time*, *Life* and *Fortune* magazines.[27] Half of all Americans over the age of ten looked at *Life* on a regular basis.[28] In 1954, the magazine sold a hundred million dollars worth of advertising, the largest of any publication to that time.[29] *Life* was a trendsetter and tastemaker, a creator and mirror of American culture, and an important source of news and entertainment for the nation. Its self-professed mission was to educate and amuse by providing a chronicle of "real life"—showing people and the world "as they really are," in all their splendor, curiosity, and horror.[30]

The Hills' unwanted exposure in *Life* began in a conversation between Hayes and Bradley Smith, a photographer who worked for

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27 There is vast literature on Time, Inc. *See* JAMES BAUGHMAN, HENRY LUCE AND THE RISE OF THE AMERICAN NEWS MEDIA 1–2, 165 (1987) (telling the story of Henry Luce's journey to becoming "America's single most powerful and innovative mass communicator" as a result of his position at the head of Time, Inc.); ALAN BRINKLEY, THE PUBLISHER: HENRY LUCE AND HIS AMERICAN CENTURY 1 (2010) (describing how Luce established his magazine empire); ROBERT ELSON, THE WORLD OF TIME, INC.: THE INTIMATE HISTORY OF A PUBLISHING ENTERPRISE 405 (1973) (describing *Life* as a "trend-setter, a taste-maker, and, in a very special way, as an educator exploring art, nuclear fission, the world of nature"); ROBERT VANDERLAN, INTELLECTUALS INCORPORATED: POLITICS, ART, AND IDEAS IN HENRY LUCE'S MEDIA EMPIRE 21–23, 306 (2010) (examining the tension between postwar intellectuals and Luce's vision of mass culture); Wollcott Gibbs, *Time . . . Fortune . . . Life . . . Luce*, *reprinted in* LIFE STORIES: PROFILES FROM THE NEW YORKER, 79, 79–90 (David Remnick ed., 2000) (outlining Time, Inc.'s early struggles and successes); James Howard Lewis, *The Saga of Time, Fortune, and Life*, MAGAZINE WORLD, May 1945, at 9–10 (examining the early years of Time, Inc.).

28 James L. Baughman, *Who Read Life?: The Circulation of America's Favorite Magazine*, *in* LOOKING AT LIFE MAGAZINE 41–42 (Erika Doss ed., 2001).

29 Otha C. Spencer, Twenty Years of Life: A Study of Time, Inc.'s Picture Magazine and Its Contributions to Photojournalism 275 (1958) (unpublished Ph.D. dissertation, University of Missouri).

30 On *Life* magazine, see DORA JEAN HAMBLIN, THAT WAS THE LIFE 274 (1977) (discussing the author's personal experiences working at Life); WENDY KOZOL, LIFE'S AMERICA: FAMILY AND NATION IN POSTWAR PHOTOJOURNALISM 9 (1994) ("*Life* explained abstract or complex problems, issues, or events through visual portraits of 'real' people."); EDWARD K. THOMPSON, A LOVE AFFAIR WITH LIFE & SMITHSONIAN 40 (1995) (writing about his experiences as managing editor of Life); LOUDON WAINWRIGHT, THE GREAT AMERICAN MAGAZINE: AN INSIDE HISTORY OF LIFE 6 (1986) (detailing Luce's vision for a picture magazine like those published in Europe); Allan C. Carlson, *Luce, Life, and the "American Way,"* *reprinted in* THE BEST OF THIS WORLD 384, 384 (Michael A. Scully ed., 1986) (describing the vast goals of Luce's publication).

Life.[31] In late 1954, Hayes and Smith were discussing how the play, which was about to open in Philadelphia, might be "sold" to the press. Hayes told Smith that one of the hostage incidents that inspired *The Desperate Hours* had taken place in Philadelphia. Smith immediately saw the publicity potential of this connection. [32]

Shortly afterwards, Smith ran into *Life*'s theater editor, Tom Prideaux, in the magazine's New York office.[33] Smith suggested that *Life* run a photo essay on the play's opening in Philadelphia, connecting it to the Hills' captivity in 1952.[34] Prideaux called Hayes and asked him if he was interested in having *Life* go to Philadelphia to take pictures of the cast doing scenes in the Hills' former home.[35] Connecting the play to a real-life hostage incident would be a great hook for the article, Prideaux said—an "interesting gimmick" to make the story "newsy," with reader appeal.[36]

In January 1955, Prideaux, his research assistant, and a *Life* photographer went to Philadelphia to photograph the cast of the play performing scenes in the home at Whitemarsh. Back at the *Life* office, a film editor reviewed the photographs and the best ones were selected for publication.[37] Prideaux sat down to write the "text block," the short article that would introduce the photos. The first draft connected *The Desperate Hours* to the Hills but suggested that the play and novel were not an exact account of the family's experience—*The Desperate Hours* was "somewhat fictionalized."

The article was sent to senior editor Joseph Kastner, who reviewed all copy before publication.[38] Kastner felt that the first draft of Prideaux's article, which led with a reference to Hayes, obscured the "newsy," real-life connection to the Hills. He told Prideaux to change the first sentence to focus on the Hills' experience, and to include the family's name. Kastner also told Prideaux to take out the phrase "somewhat fictionalized," so that the sentence read, "Hayes' play is a heart-stopping account of how one family rose to heroism in a crisis."

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31 Sarah Boxer, *Bradley Smith, 87, Champion of the Rights of Photographers*, N.Y. TIMES, Sept. 7, 1997, at 52.

32 Letter from Bradley Smith to A.J. Malino, Box 3, Folder 1 (n.d.), *contained in* Hayes Collection, Box 10, Folder 3, Lilly Library Manuscript Collections, Indiana University.

33 N.M. Goodwin, *The Desperate Hours Story*, HARTFORD COURANT, July 3, 1955.

34 Transcript of Record, Hill v. Hayes, *supra* note 8, at 180, 192; Bradley Smith to A.J. Malino, Feb. 26, 1957, *in* Hayes Collection, Box 10, Folder 3, Lilly Library Manuscript Collections, Indiana University.

35 Transcript of Record, Hill v. Hayes, *supra* note 8, at 122.

36 *Id.* at 180.

37 *Id.* at 128.

38 WAINWRIGHT, *supra* note 30, at 239.

Prideaux had initially written that the Hill incident "sparked off" the book. In the new version, the novel was "inspired" by it. The revised version also said that the Hills' story was "re-enacted" in the play. The result of Kastner's edits was to depict *The Desperate Hours* as a near-faithful portrayal of the Hills' experience. [39]

The three-page photo essay, titled "TRUE CRIME INSPIRES TENSE PLAY," with the subtitle, "The ordeal of a family trapped by convicts gives Broadway a new thriller, 'The Desperate Hours,'" ran in the *Life* issue dated February 28, 1955.

> Three years ago Americans all over the country read about the desperate ordeal of the James Hill family, who were held prisoners in their home outside Philadelphia by three escaped convicts. Later they read about it in Joseph Hayes's novel, *The Desperate Hours*, inspired by the family's experience. Now they can see the story re-enacted in Hayes's Broadway play based on the book . . . .
>
> The play . . . is a heart-stopping account of how a family rose to heroism in a crisis. LIFE photographed the play during its Philadelphia tryout, transported some of the actors to the actual house where the Hills were besieged. On the next page scenes from the play are re-enacted on the site of the crime.

At the top of the first page ran a photograph of the Hills' former home and a headline from the September 12, 1952 *Philadelphia Daily News*, "BANK ROBBERS HOLD FAMILY IN WHITEMARSH PRISONERS," underscored by the caption "Actual event, as reported in newspaper, took place in isolated house about 10 miles from Philadelphia. There three convicts from Lewisburg penitentiary held family of James Hill as prisoners while they hid from manhunt. All three convicts were later captured."[40] It wasn't false to say there was a connection between the Hills and the play and that the Hills' story had "inspired" *The Desperate Hours*. But "re-enactment" was a serious exaggeration, perhaps even an outright lie. Even a cursory reading of *The Desperate Hours*, the news articles from September 1952, and Hayes' own, published musings on his creative process would have revealed that the story didn't "reenact" the Hills' experience. The use of the picture of the Hills' former home, the newspaper headline, and the family's name to publicize the play was perhaps *Life*'s greatest sin. The opening of *The Desperate Hours* could have been reported without any mention of the Hills whatsoever.

The Hills, who subscribed to *Life*, received the issue shortly after its publication. Stunned, they looked at the article repeatedly, get-

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39 Transcript of Record, Hill v. Hayes, *supra* note 8, at 239.

40 *True Crime Inspires Tense Play*, LIFE, Feb. 25, 1955, at 75.

ting angrier every time. "We couldn't understand how [*Life*] could do that just for the sake of some free publicity," James Hill recalled:

> "We certainly couldn't understand how *Life* could publish an article such as this without first checking the newspapers or at least picking up a telephone to find out whether this was the truth or how we felt about it. It was just like we didn't exist, like we were dirt, like they didn't care."[41]

James called Bob Guthrie, an old friend who was working as a partner at a prestigious Wall Street law firm, Mudge, Stern, Baldwin, and Todd. He told Guthrie he was interested in bringing suit against *Life*, presumably for libel. A white-shoe firm like Mudge generally didn't take tort cases; the firm represented the country's largest and most prestigious companies in high-profile corporate matters. But Guthrie made an exception for his friend, whom he agreed to represent on a contingent fee basis.[42]

Guthrie assigned the case to Leonard Garment, a thiry-one-year-old associate and graduate of Brooklyn Law School who would later become head of the litigation department at Mudge and in the 1970s, Richard Nixon's counsel in the Watergate affair. Garment was intrigued by the Hill case, which became a "fascinating diversion" for him—"a kind of adventure in lawyering" outside the commercial practice he was used to.[43]

Garment's first step was to attempt to avert a lawsuit by asking *Life* to publish a retraction. He sought a notice, printed in a subsequent issue, explaining that it had made a mistake connecting the Hills to *The Desperate Hours*. Predictably, *Life's* editors refused Garment's request.[44] *Life*'s flippant response outraged the Hills, and Garment initiated legal proceedings.[45]

It soon became apparent that a suit for libel was not an option. Libel requires that a statement be both false and defamatory; that it expose a person to "hatred" or "contempt," "injure him in his profession or trade, [and] cause him to be shunned or avoided by his neighbors."[46] While the *Life* article may have upset and embarrassed the Hills, it did not defame the family. To the contrary, it presented

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41 Transcript of Record, Hill v. Hayes, *supra* note 8, at 232.

42 *See* GARMENT, *supra* note 5, at 80 (describing how Mudge became involved in the *Hill* case); PAUL HOFFMAN, LIONS IN THE STREET: THE INSIDE STORY OF THE GREAT WALL STREET LAW FIRMS 111 (1973) (same); Paul Hoffman, *Mudge Rose, & Alexander: The Firm to See?*, NEW YORK MAGAZINE, Apr. 26, 1971, at 37, 40 (describing the Mudge firm).

43 *See generally* GARMENT, *supra* note 5 (recounting Garment's involvement with Nixon and the case).

44 *Id.* at 80.

45 *Id.*

46 W. BLAKE ODGERS, A DIGEST OF THE LAW OF LIBEL AND SLANDER 18 (3d ed. 1896).

the Hills in a positive, flattering light—as noble and heroic. With libel foreclosed, Garment investigated the possibility of a suit for invasion of privacy under New York law.

II. THE LAW OF PRIVACY

In most states by the 1950s, people could sue for "invasion of privacy" and recover damages for emotional distress when their pictures or private facts were publicized in a humiliating, offensive manner. According to the *Restatement of Torts*, "a person who unreasonably and seriously interferes with another's interest in not having his affairs known to others or his likeness exhibited to the public is liable to the other."[47] By 1960 an invasion of privacy tort was "declared to exist by the overwhelming majority of American courts."[48]

From its inception the privacy tort had been controversial. While there was often great sympathy for individuals unwillingly thrust into the media spotlight, some argued that liability for the publication of nondefamatory facts, however personal or embarrassing those facts might be, was an infringement on freedom of the press. The *Hill* case became part of that ongoing debate.

A. The Origins of The Privacy Tort

The privacy tort was a response to the rise of mass publishing in the late nineteenth century. Between 1870 and 1900, advances in printing technology, rising literacy rates, and expanding urban populations led to an outpouring of printed material. Newspapers and magazines had begun to feature "human-interest" stories as well as gossip columns, filled with details of private life.[49] The disclosure of personal facts in the press sometimes led to serious emotional injuries. A man whose clandestine marriage was exposed in a gossip column "elaborated . . . with sensational details," was so distraught by "the sudden gaze of a whole community" that he committed suicide.[50] A man committed crimes in his youth and went on to become a respectable member of his community. A newspaper "amplified the story" of his past life in "sensational style" and the man died under the stress of the exposure.[51] Because the material was true, there

47 RESTATEMENT (FIRST) OF TORTS § 867.

48 William L. Prosser, *Privacy*, 48 CAL. L. REV. 382, 389 (1960).

49 *See* Helen MacGill Hughes, *The Social Interpretation of News*, 219 ANNALS AM. ACAD. POL. & SOC. SCI. 11, 12–14 (1942) (citations omitted).

50 *Newspaper Brutality*, CHRISTIAN UNION, Dec. 5, 1889, at 708.

51 *Id.*

could be no action for libel, and this gap in the law became the subject of criticism and proposals for reform.

In the famous 1890 *Harvard Law Review* article "The Right to Privacy," the Boston lawyers Samuel Warren and Louis Brandeis accused the press of "overstepping in every direction the obvious bounds of propriety and of decency."[52] "[P]ersons with whose affairs the community has no legitimate concerns" were "being dragged into an undesirable and undesired publicity."[53] Having one's personal details publicized in a newspaper caused embarrassment and "mental pain and distress, far greater than could be inflicted by mere bodily injury."[54] They proposed a "right to privacy," a cause of action under the common law that would allow the victims of "invasions of privacy"—humiliating publicity of one's image or personal facts—to sue and recover monetary damages for mental anguish.[55] Unlike libel, the tort of invasion of privacy did not protect a person's reputation, but one's right to control his public persona: his right "of determining . . . to what extent his thoughts, sentiments, and emotions shall be communicated to others."[56]

The scope of liability was broad, but there would be a safe harbor for the press. The publication of "matters of public and general interest" would be privileged, Warren and Brandeis proposed.[57] Such matters concerned the public interest, in the sense of the public welfare or common good, such as serious news about politics, or the public activities of public leaders.[58] Mere trivia and gossip, though perhaps interesting, were not "matters of public interest."[59] By the early twentieth century, several states had approved a tort of invasion of privacy under the common law or by statute.[60]

The privacy tort was relatively unproblematic under reigning free speech doctrines. In the late nineteenth century it was generally agreed that the right of free speech precluded prior restraints but

52 Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 196 (1890).

53 *Id.* at 215.

54 *Id.* at 196.

55 *Id.* at 213.

56 *Id.* at 198.

57 *Id.* at 214.

58 *Id.*

59 *Id.* at 214–15.

60 *See, e.g.*, Va. Code Ann. § 8.01-40 (1977); Utah Code Ann. §§ 76-9-401 to -402 (1973); N.Y. Civ. Rights Law § 50 (1909); Munden v. Harris, 134 S.W. 1076, 1079 (Mo. Ct. App. 1911); Foster-Milburn Co. v. Chinn, 120 S.W. 364, 366 (Ky. 1909); Edison v. Edison Polyform Mfg., 67 A. 392, 394–95 (N.J. Ch. 1907); Pavesich v. New Eng. Life Ins. Co., 50 S.E. 68, 73 (Ga. 1905).

permitted the punishment of publications for their "bad tendency," their propensity to create moral harm or violence and unrest.[61] Insofar as gossip and salacious depictions of private life injured people and degraded society's moral fabric, they had a "bad tendency."

Yet some forward-looking commentators suggested that liability for publishing truthful facts could infringe on freedom of speech. Newspapers might be forced to pay damages for publishing photographs that their subjects found displeasing. Politicians and public officials could potentially use their "right to privacy" to quash truthful criticism or suppress reports of misdeeds or corruption.[62] In an 1893 case, the wife of a deceased, famous inventor brought suit against the publisher of an unauthorized biography of her late husband, claiming an invasion of privacy. The court rejected the claim, concluding that imposing liability for the publication of a public figure's life story would be a "remarkable exception to liberty of the press."[63]

B. The Simultaneous Expansion and Contraction of Privacy

By the 1940s the privacy tort had been recognized in at least fifteen jurisdictions. Courts offered relief to individuals who had been humiliated, misrepresented, or otherwise offended by unwanted media exposure.[64] In 1926, a woman named Louise Peed was found unconscious in an apartment, the victim of a "carelessly closed gas jet." *The Washington Times* published a picture of Peed along with a story about the accident. She was embarrassed, and she sued the newspaper for invasion of privacy; the defendant's motion to dismiss was rejected. The court mocked the newspaper's efforts to invoke freedom of the press as a defense: that liberty did not carry with it the "privilege of invading any…right of the citizen," including one's right to keep one's misfortunes out of the papers.[65]

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61 DAVID M. RABBAN, FREE SPEECH IN ITS FORGOTTEN YEARS 2, 132 (1997) (internal quotation marks omitted); *see also* MICHAEL KENT CURTIS, FREE SPEECH, "THE PEOPLE'S DARLING PRIVILEGE": STRUGGLES FOR FREEDOM OF EXPRESSION IN AMERICAN HISTORY 385, 395 (2000) (discussing the end of the "bad tendency" doctrine).

62 *Actionable Publicity*, 9 CASE AND COMMENT 194, 194 (1901).

63 Corliss v. E.W. Walker Co., 57 F. 434, 435 (Cir. Ct. Mass. 1893).

64 Louis Nizer, *The Right of Privacy: A Half Century's Developments*, 39 MICH. L. REV. 526, 529–30 (1941); *see also* L.S. Clemons, *The Right of Privacy in Relation to the Publication of Photographs*, 14 MARQ. L. REV. 193, 194–96 (1930); Gerald Dickler, *The Right of Privacy: A Proposed Redefinition*, 70 U.S. L. REV. 435, 438–53 (1936); Edward N. Doan, *The Newspaper and the Right of Privacy*, 5 J. KAN. B. ASS'N 203, 203 (1937); Basil W. Kacedan, *The Right of Privacy*, 12 B.U.L. REV. 353, 367–85 (1932); Roy Moreland, *The Right of Privacy Today*, 19 KY. L.J. 101, 113 (1931).

65 Peed v. Washington Times, 55 W.L.R. 182–83 (D.C. 1927).

At the same time privacy law was expanding, however, courts were widening its privileges in response to changes in First Amendment law. In a series of cases in the 1930s and 40s, the Supreme Court eliminated the "bad tendency" rule. The mere "tendency" of speech to create harm was no longer enough to justify its prohibition. For the government to curtail speech, it had to show that the expression was "of such a nature as to create a clear and present danger" of serious harm. The advocacy of unpopular political, moral, or religious views did not by itself rise to the level of serious harm.[66] Government abridgements of speech were henceforth viewed under a strict scrutiny standard. Because free expression was "the matrix, the indispensable condition, of nearly every . . . form of freedom," as the Court wrote in 1937, freedom of speech occupied a preferred position in the scheme of constitutional liberties, and state actions restricting speech could not stand unless justified by a compelling government interest beyond mere disagreement with the views espoused.[67]

In *Near v. Minnesota*,[68] the Court struck down a Minnesota state nuisance law that prohibited the publication of a "malicious, scandalous, and defamatory newspaper, magazine or other periodical."[69] The statute was aimed at the distribution of matter "detrimental to public morals and to the general welfare," "tending to disturb the peace of the community" and to provoke "assaults and the commission of crime."[70] The Court characterized the law as "the essence of censorship" and noted the importance of a "vigilant and courageous press" that would expose the abuses of corrupt governments and "unfaithful officials."[71] In *Near*, the Court included freedom of the press as one the liberties incorporated through the Fourteenth Amendment and made applicable to the states.[72]

In the 1940s, some courts began to reject the narrow, Warren and Brandeis view of what constituted a privileged "matter of public interest." That view, as will be recalled, was a normative one: what was a matter of "public concern" or "public interest" was not what actually interested the public, but rather what judges believed that the public should know, in its own best interest. In the new model, "matters of

66 G. Edward White, *The First Amendment Comes of Age: The Emergence of Free Speech in Twentieth-Century America*, 95 MICH. L. REV. 299, 330–38 (1996).

67 Palko v. Connecticut, 302 U.S. 319, 326–27 (1937).

68 283 U.S. 697 (1931).

69 *Id.* at 702.

70 *Id.* at 709 (internal quotation marks omitted).

71 *Id.* at 713, 719–20.

72 *Id.* at 697.

public interest" was a descriptive term: if material attracted the public's attention or interest, it was a "matter of public interest."[73] A report of a child custody proceeding, newsreel footage of an overweight woman in an exercise course, embarrassing material in a gossip column, and a dramatized radio broadcast about a man's mysterious disappearance were all deemed to be "matters of public interest" or newsworthy material.[74]

Because there was great curiosity in public figures' private lives, their personal affairs were "matters of public interest," according to some courts.[75] The law of privacy had always been more solicitous of ordinary people than public figures, but some courts were now claiming that even private citizens waived their right to privacy when they became involved, willingly or unwillingly, in "matters of public interest."[76] The victims of accidents and crimes had no right to privacy, insofar as those events were newsworthy.[77] As the Second Circuit Court of Appeals noted in an important 1940 privacy decision, *Sidis v. F-R. Publishing*, involving a reclusive child genius who sued over unwanted publicity in *The New Yorker*, "regrettably or not, the misfortunes and frailties of neighbors and public figures" were subjects of interest to the public, "[a]nd when such are the mores of the community it would be unwise for a court to bar their expression in the newspapers, books, and magazines of the day."[78]

The objective of the broad newsworthiness or "matters of public interest" standard was to get courts out of the business of making value judgments about the worth of publications. The judicial creation of a definition of news or "matters of public interest" that overrode the media's publishing decisions and the public's consumption choices was seen by some as an impermissible form of censorship. As with libel, the privacy tort did not raise a formal First Amendment is-

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73 Lahiri v. Daily Mirror, Inc., 295 N.Y.S. 382, 389 (N.Y. App. Div. 1937).

74 Berg v. Minneapolis Star & Tribune Co., 79 F. Supp. 957, 958, 963 (D. Minn. 1948); Sweenek v. Pathe News, Inc., 16 F. Supp. 746, 747 (E.D.N.Y. 1936); Smith v. Doss, 37 S.2d 118, 121 (Ala. 1948); Middleton v. News Syndicate Co., 295 N.Y.S. 120, 121 (N.Y. App. Div. 1937).

75 *See, e.g.*, Sidis v. F-R Publ'g Corp., 113 F.2d 806, 809 (2d Cir. 1940).

76 "One who is not a recluse," according to the *Restatement*, must expect commentary on "the ordinary incidents of community life of which he is a part." RESTATEMENT (SECOND) OF TORTS § 652E (1977) These include comment upon his conduct, the more or less casual observation of his neighbors as to what he does upon his own land and the possibility that he may be photographed as a part of a street scene or a group of persons.

77 Metter v. Los Angeles 18 S.W.2d 972 (Ky. Ct. App. 1929).

78 *Sidis*, 113 F.2d at 809.

sue; tort liability was not yet considered to be state action.[79] Courts nonetheless described the newsworthiness or "public interest" privilege as important protection for freedom of the press. As a New York trial court noted in the 1937 case *Lahiri v. Daily Mirror*, a right of privacy that imposed liability for "news items and articles of general public interest, educational and informative in character," implicated the rights of a "free press."[80]

In 1903 New York had created a privacy law by statute.[81] Unlike the common law tort, New York's privacy law specifically targeted the unauthorized use of people's identities for commercial purposes.[82] Civil Rights Law Sections 50 and 51, titled the "Right of Privacy," penalized the unauthorized use of a person's "name, portrait, or picture" for "advertising" or for "trade" uses.[83] Section 50 made the violation a misdemeanor; Section 51 granted the right to sue for an injunction and compensatory and punitive damages. Damages were awarded for emotional distress.[84]

The courts of New York, the center of the publishing industry, were among the most protective of the press in the country. Almost immediately after the passage of the privacy statute, the state's courts made it clear that in the interest in freedom of the press, the use of names, portraits, and likenesses in the news did not fall under the prohibition of "trade" uses.[85] Although the New York courts never said exactly what the news was, they made clear that it extended beyond straight factual reporting on politics, public affairs, and other traditional news items to gossip and sensationalistic journalism.

The plaintiff in the 1914 case *Colyer v. Fox*[86] was a professional high diver who had her photograph taken in costume.[87] A copy came into the possession of the *National Police Gazette*, a disreputable, bawdy men's magazine.[88] The woman claimed that the *Police Gazette* was not a serious news publication and therefore publishing her photograph was actionable as a "trade" use.[89] The court rejected the argument,

79 *See* Beauharnais v. Illinois, 343 U.S. 250 (1952); Chaplinsky v. New Hampshire, 315 U.S. 568, 573 (1942).
80 *Lahiri*, 295 N.Y.S. at 388–89.
81 Act of Apr. 6, 1903, ch. 132, 1903 N.Y. Laws 308.
82 N.Y. Civ. Rights Law §§ 50–51 (1909).
83 *Id.*
84 *Id.*
85 *See, e.g.*, Moser v. Press Pub., 109 N.Y.S. 963, 963 (N.Y. App. Div. 1908).
86 146 N.Y.S. 999 (N.Y. App. Div. 1914).
87 *Id.* at 999–1000.
88 *Id.*
89 *Id.*

noting that "[a]pplied as the appellant would desire, [the statute] would cover nearly every issue of our newspapers, and especially our great number of monthly magazines."[90]

New York's expansive definition of news, and narrow definition of "trade," did not give the press carte blanche to publish people's pictures, names, and life stories, however. What about a case where a news article was falsified? Newspapers of the time were not above "faking" stories—concocting so-called news items from whole cloth. Would a faked article merit the same protections as truthful news?

The *New York Herald* published an article allegedly written by a man named D'Altomonte, a member of the Italian nobility, "a professional newspaper correspondent, traveler, writer, and lecturer of recognized ability, commanding several languages."[91] The article, about African travel, was published under D'Altomonte's name, but the nobleman did not write it.[92] The article, he alleged, was silly and ridiculous; although not defamatory, it made him look foolish and uneducated.[93] He sued under the privacy statute.[94] The court held that the article was an actionable "trade" publication. A falsified or fictionalized publication could not be privileged as news.[95]

C. A Haystack in a Hurricane

During the 1950s the number of reported privacy cases more than doubled that of any previous decade.[96] The increase tracked the growth of the media in the postwar era. Newspaper circulation reached historic highs; by 1960, there were 1.3 newspapers per American.[97] Book sales in the U.S. increased by 450%.[98] The new medium of television was introduced, and by 1952 over 18,000 television sets were in use.[99] By 1960 there were more than 300 reported privacy cases, and the tort of privacy had been recognized in a majority of

90 *Id.* at 1000–01.

91 D'Altomonte v. N.Y. Herald, 139 N.Y.S. 200, 201 (N.Y. App. Div. 1913).

92 *Id.* at 202.

93 *Id.* at 201–02.

94 *Id.*

95 *Id.*

96 Don R. Pember & Dwight L. Teeter, Jr., *Privacy and the Press Since* Time, Inc. v. Hill, 50 WASH. L. REV. 57, 60–62 (1974).

97 WILLIAM H. YOUNG & NANCY K. YOUNG, THE 1950S, at 153 (2004).

98 LEE BURRESS, BATTLE OF THE BOOKS: LITERARY CENSORSHIP IN THE PUBLIC SCHOOLS, 1950–1985 (1989).

99 J. Joseph Cummings, *Television and the Right of Privacy*, 36 MARQ. L. REV. 157, 157 n.1 (1952).

states.[100] "How many more [privacy cases] are settled in lower courts or out of court cannot even be estimated," observed a major journalism trade publication.[101] "The number of cases can be said to be definitely increasing."[102]

In an era when tort liability was expanding more generally, courts found invasions of privacy in all manner of depictions plaintiffs found to be embarrassing, offensive, or otherwise injurious to their sense of self. A California trial court issued a $290,000 judgment against the film company Loew's Inc, over a complaint by a woman who was the model for an Army nurse in the film *They Were Expendable*.[103] The court concluded that depicting her romance with a Navy lieutenant on screen was an invasion of her privacy and not justified by the public's interest in "news."[104] In 1952, when a commercial flight developed engine trouble, a Navy commander on board helped land the plane.[105] A televised dramatization of the incident, altering the details, portrayed him foolishly: "praying during the course of [the] emergency landing . . . wearing a so-called Hawaiian shirt . . . [and] repeatedly . . . smoking a pipe and cigarettes."[106] A federal court determined that a jury could potentially find in the distorted broadcast an "offensive invasion of privacy."[107] Yet at the same time, some courts were interpreting the "newsworthiness" and "matters of public interest" privileges liberally. Stories about a politician's home and family life, a sensationalistic article about a homicide in *Official Detective Stories* magazine, images of car accident victims—however crass, invasive or trivial, these publications were "newsworthy" and exempt from liability for invasion of privacy, insofar as they served the public's interest in being informed.[108]

In the 1950s privacy law had reached a crossroads. State rules varied considerably, and the law's uncertainty had become a major problem for the publishing industry, which faced growing litigation, unpredictable outcomes, and at times, substantial verdicts. A federal

100 Harry Kalven, Jr., *Privacy in Tort Law—Were Warren and Brandeis Wrong?*, 31 LAW & CONTEMP. PROBS. 326, 327 (1966).

101 Norris G. Davis, *Invasion of Privacy, A Study in Contradictions*, 30 JOURNALISM Q. 179, 187 (1953).

102 *Id.*

103 Walcher v. Loew's Inc., 129 F.Supp. 815 (E.D. Mo. 1949); 2 RIGHTS OF PUBLICITY AND PRIVACY § 11:29 (2d ed. 2015).

104 *Walcher*, 129 F.Supp. at 815.

105 Strickler v. NBC, 167 F. Supp. 68, 69 (S.D. Cal. 1958).

106 *Id.*

107 *Id.* at 71.

108 Kapellas v. Kofman, 459 P.2d 912, 923–24 (Cal. 1969); Blount v. T.D. Publ'g, 423 P.2d. 421, 423–24 (N.M. 1966); Kelley v. Post Publ'g, 98 N.E.2d 286, 286–87 (Mass. 1951).

judge described the unsettled state of the law as akin to a "haystack in a hurricane."[109] This was the backdrop against which the Hills brought their case.

III. *HILL V. HAYES*

In October 1955, Leonard Garment filed a complaint on behalf of James and Elizabeth Hill under the New York privacy statute, seeking damages for emotional distress.[110] Connecticut, where the Hills resided, had not recognized the privacy tort, and James Hill's employment in New York City, and the circulation of the publication in New York, was sufficient to establish New York jurisdiction.[111] The suit was against Time, Inc. and Joseph Hayes.[112] The *Life* article, Garment alleged, was an invasion of the Hills' privacy—an unauthorized use of their identities in a publication that was false and fictionalized.[113]

To be clear, what the Hills were most outraged by was their unwanted exposure to the public gaze. They were angry that *Life* had presented them falsely, but even more upset by the fact that the magazine had rehashed their misfortune over two years later. Under the New York privacy case law, however, the mere fact of being publicized would not have been actionable, since the Hills had become "newsworthy" by virtue of being victims of a crime. Garment therefore had to hinge the Hills' claim on the falsity of the publication, which rendered it "non-newsworthy" under New York law.

The "*Life* magazine article of February 28, 1955 was intended to, and actually did convey the impression that the plaintiffs Hill and their children were the family . . . depicted in the novel, play and mo-

109 Ettore v. Philco Television Broad., 229 F.2d 481, 485 (3d Cir. 1956).

110 The claim was initially against every party involved in the "creation, publication, and dissemination of the book, play, and movie *The Desperate Hours*," as well as the *Life* article—Joseph Hayes, Time Inc., Paramount Pictures, Random House, The Literary Guild, Crowell-Collier Book Publishing, Pocket Books, and the Readers' Digest Association. The argument was that the publication of the novel, the production of the play and the film, and the *Life* article were invasions of the Hills' privacy—unauthorized uses of their identities that were false and for commercial purposes. In May 1956, the lawyers for Random House and Pocket Books moved to dismiss the claim on the ground that a "novel based upon real life incidents and characters" did not violate the New York privacy law. The trial court granted the motion; because the Hills were not specifically identified in the book, there was no violation of the statute, which prohibited the use of the "name, portrait or picture" of the plaintiff. Hill v. Hayes, 155 N.Y.S.2d 234, 235 (N.Y. App. Div. 1956).

111 Hill v. Hayes, 207 N.Y.S.2d 901, 903–04 (N.Y. App. Div. 1960).

112 *Id.* at 901.

113 Complaint at 434, Hill v. Hayes, 155 N.Y.S.2d 234 (N.Y. Sup. Ct. 1956). The complaint is part of the Trial Record on appeal (207 N.E.2d 604).

tion picture *The Desperate Hours*," read the complaint.[114] The use of the Hills' identities in *Life* magazine was primarily for "advertising"—a scheme to increase the magazine's circulation by "falsely and sensationally" linking the play to the family.[115] There was no legitimate reason "as a matter of news dissemination or otherwise, to identify the plaintiffs Hill with the Hilliard family."[116] Garment believed that Hayes was complicit in the article, that he "collaborated with and made it possible for defendant Time, Inc. to prepare and publish said article" as a publicity scheme for the play. [117]

The depositions had demonstrated, in Garment's view, that *Life intentionally* falsified the connection between the Hills and *The Desperate Hours*. Garment's examination of *Life* editor Tom Prideaux revealed that Prideaux linked the Hills and the play as a "gimmick," a ploy to make the article interesting and sensational, even though there was evidence that Prideaux knew *The Desperate Hours* was not really a "reenactment" of the Hill incident.[118] Concluding that the article was a deliberate, intentional, even malicious distortion of the truth, Garment sought punitive damages. The Hills asked for what was then the extraordinary sum of $900,000 from Hayes and Time, Inc.—$100,000 actual and $200,000 punitive damages for James Hill, and $200,000 actual and $400,000 punitive damages for Elizabeth Hill.[119]

A. The Defense

Time, Inc.'s lawyers were unfazed by Garment's legal overtures. Every year about two to three hundred readers threatened to sue Time, Inc. for libel or invasion of privacy.[120] Most who sued didn't win.[121] Like many major publishing companies, Time, Inc. was repre-

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114 Third Amended Complaint at 11, Hill v. Hayes, 13 A.D.2d 954 (N.Y.App. Div. 1961).

115 *Id.* at 12.

116 Complaint at 431, Hill v. Hayes, 155 N.Y.S.2d 234 (N.Y. Sup. Ct. 1956).

117 The complaint alleged that "Hayes had knowledge . . . that defendant Time, Inc., intended to identify the plaintiffs Hill and their children as the specific family portrayed in *The Desperate Hours*, and nevertheless . . . thereafter collaborated with and made it possible for defendant Time, Inc. to prepare and publish said article." Third Amended Complaint, *supra* note 114, at 12.

118 Reply Brief for the Appellant at 374, Time, Inc. v. Hill, 385 U.S. 374 (1967).

119 Third Amended Complaint, *supra* note 114, at 8–17. Hayes's lawyer wrote to his client with alarm, saying that "the action always had a serious aspect to it but it is becoming extremely complex and cumbersome." Nonetheless, he assured Hayes, "[W]e have an excellent chance to lick this case." Letter from Berman to Hayes (May 8, 1958), *in* Hayes Collection, Box 10, Folder 3, Lilly Library Manuscript Collections, Indiana University.

120 JOHN KOBLER, LUCE: HIS TIME, LIFE, AND FORTUNE 158 (1968).

121 *Id.*

sented by the nation's best and most expensive legal talent. As publishing became a large-scale corporate enterprise, publishers could afford to hire the most skilled advocates. Elite firms like Sullivan and Cromwell; Kirkland and Ellis; Weil, Gotshal and Manges; and Lord, Day & Lord represented media outlets like the *Chicago Tribune*, the *New York Times*, and the publishing houses Scribner's and Random House.[122]

The Wall Street firm Cravath, Swaine, and Moore had represented Time, Inc. since 1926.[123] Cravath assisted the company with a variety of issues related to its business and printing operations as well as problems stemming from its publications.[124] As the firm's history noted, "the lively, breezy style of all the Time, Inc. publications has naturally led to many scores of suits and threatened suits for alleged libel and invasion of the right of privacy."[125] Time, Inc. also had its own in-house counsel that worked closely with Cravath's lawyers.[126]

For many years, the Cravath litigating department boasted that it had never lost a single libel or privacy case.[127] As of 1948, only three libel cases had been lost, in two of which only nominal damages were awarded.[128] In the 1940s the notorious Bruce Bromley was trial counsel for Time, Inc.'s libel and privacy cases.[129] Bromley, who later became a New York state judge, was infamous for his "hardball" tactics, including exhausting the opposition by filing motion after motion and dragging out the simplest cases "almost to infinity."[130] The lawyer who represented Time, Inc. in the *Hill* case was Harold Medina, Jr., a Columbia Law graduate and a well-known attorney specializing in media issues; Medina's father, Harold Medina Sr., was a noted judge

122 On Lord, Day & Lord, see generally KERMIT L. HALL & MELVIN I. UROFSKY, NEW YORK TIMES V. SULLIVAN: CIVIL RIGHTS, LIBEL LAW, AND THE FREE PRESS (2011); on Kirkland and Ellis and the *Chicago Tribune*, see generally Eric B. Easton, *The Colonel's Finest Campaign: Robert R. McCormick and Near v. Minnesota*, 60 FED. COMM. L.J. 183 (2008).

123 *See* [II] ROBERT T. SWAINE, THE CRAVATH FIRM AND ITS PREDECESSORS 1819–1948, at 611–16 (1948) (noting that Cravath's stable of business clients included media giants: the Curtis company, publishers of the *Saturday Evening Post*; the *Philadelphia Inquirer*; *Look* magazine; *Esquire*, and the *Washington Post*, along with Time, Inc. were its most prominent publishing clients).

124 *Id.*

125 *Id.* at 613.

126 *See* THOMPSON, *supra* note 30, at 142 (explaining that while the Cravath team handled the actual court work, Time, Inc.'s in-house lawyers regularly provided Cravath's lawyers with an appreciation of the risks involved in its litigation strategy).

127 SWAINE, *supra* note 123, at 614.

128 *Id.*at 614 n.2.

129 *Id.* at 613–14.

130 David Margolick, *The Law; At The Bar*, N.Y. TIMES, May 20, 1988, http://www.nytimes.com/1988/05/20/us/the-law-at-the-bar.html?pagewanted=print.

on the Second Circuit Court of Appeals.[131] By the 1960s, Medina had successfully represented Time, Inc. in dozens of libel and privacy cases.[132]

Historically, libel had been a major threat to the press, and it remained so. Media lawyers in the 1950s and 60s were also concerned with liability for invasion of privacy. The law of privacy was far less developed than libel law, which had a set of elaborate and well-defined privileges and defenses that protected the press, such as the "fair comment" and fair report privileges, and the defense of truth.[133]

Privacy law had no such protections. As the law of privacy stood in the 1950s, in some states, a plaintiff could potentially recover for a true, nondefamatory statement if a court deemed the material to be not newsworthy or a "matter of public concern," a vague and ill-defined standard.[134] Also troubling to media lawyers was the emerging tort of "false light" privacy, which paralleled New York's statutory privacy. Under the false light tort, plaintiffs could recover for false, fictionalized, or misleading publications that were nondefamatory but emotionally distressing.[135] Plaintiffs who were offended by media publications could circumvent libel law and recover under the less stringent rules of privacy—and many were doing exactly that.[136]

In the *Hill* case, Time, Inc.'s lawyers mobilized the familiar newsworthiness defense. "The *Life* article was a subject of legitimate news interest," they argued.[137] The story connected two newsworthy events, the opening of the play and the Hill incident. The piece in *Life* was in "every respect a subject of general interest and of value and concern to the public at the time of its publication."[138] Both the debut of *The Desperate Hours* and the Hills' victimization by the escaped convicts were important events of "public concern."[139]

Time, Inc. contended that the story was in no way false or fictionalized because the connection between *The Desperate Hours* and the Hills' incident was essentially *true*. Time, Inc.'s lawyers created a dia-

131 Glenn Fowler, *H.R. Medina, Jr., 78, Lawyer and Expert in Libel and Privacy*, N.Y. TIMES, Feb. 20, 1991, at D23.

132 *See, e.g.*, Berkson v. Time, Inc., 187 N.Y.S.2d 849 (N.Y. App. Div. 1959); Curtis v. Time, Inc., 251 F.2d 389 (D.C. Cir. 1958); Green v. Time, Inc., 143 N.E.2d 517 (1957); Time, Inc. v. Hartmann, 334 U.S. 838 (1948).

133 *See* Comment, *Developments in the Law of Defamation*, 69 HARV. L. R. 875, 925–33 (1956) (describing the privileges and defenses to defamation causes of action).

134 *See, e.g.*, Leverton v. Curtis Publ'g, 97 F. Supp. 181, 182 (E.D. Pa. 1951).

135 Prosser, *supra* note 48, at 398–401.

136 *Id.* at 401.

137 Answer of Defendant Time, Inc., Time, Inc. v. Hill, 385 U.S. 374 (1967).

138 *Id.*

139 *Id.*

gram, what they described as a "parallel column display," that listed side by side the similarities between *The Desperate Hours* and the Hills' experience.[140] Among them: "Mr. Hilliard, a man in his early forties. Mr. Hill, a man in his early forties. Mrs. Hilliard, an attractive woman in her early forties. Mrs. Hill, an attractive woman in her early forties. A teenage daughter (on both sides). The play had a ten year old son; the real-life incident had an eleven-year old son."[141] "Both incidents, the real and the fictional, took place at approximately 8:30 am, in an isolated suburb of a large city."[142] Although *The Desperate Hours* was obviously not a *precise* reenactment of the Hills' ordeal, the article was "accurate" because the play was, more or less, about the Hills.[143]

The trial court rejected Time, Inc.'s motion for summary judgment, concluding that there were significant questions as to whether the *Life* article was true or fictionalized and that the case should be sent to trial to resolve the issue.[144] The judge thought that the *Life* article seemed like an intentional fabrication, a "piece of commercial fiction."[145] Time, Inc. appealed, and on June 27, 1961, the Appellate Division, First Department affirmed the lower court. [146]

B. Trial

In April 1962, nearly six years after it had begun, the *Hill* case proceeded to trial before the New York State Supreme Court in Manhattan. Leonard Garment argued that the *Life* article was intentionally falsified and could not be newsworthy under New York law.[147] "We didn't lie . . . we acted in good faith," Medina told the jury. "We reported a newsworthy event, and . . . we . . . are entitled to be cleared of these lies against us."[148]

The legal arguments mattered in this contentious trial, but the emotional strategies were equally if not more important. And here the Hills' lawyers had the upper hand. As Garment recalled,

> Both I and my calmly competent trial assistant, Don Zoeller . . . saw what our job was. We knew the judge and jury might well wonder why the Hills were so bothered by *Life*'s article. . . . [So] we saw that we had to get

140 *See* Brief of Appellant at 37–38, Hill v. Hayes, 15 N.Y.2d. 986 (1965).
141 *Id.* at 38.
142 *Id.* at 37.
143 Brief of Appellant, Hill v. Hayes, 13 A.D.2d 954 (1961).
144 Hill v. Hayes, 207 N.Y.S.2d 901, 904 (N.Y. App. Div. 1960).
145 *Id.* at 903.
146 Hill v. Hayes, 216 N.Y.S.2d 497 (N.Y. App. Div. 1961).
147 Transcript of Record at 461–73, Time, Inc. v. Hill, 385 U.S. 374 (1967) [hereinafter Transcript of Record, Time, Inc v. Hill].
148 *Id.* at 467.

> the jury as angry as we were at Time, Inc. . . . [W]e bet our case on the theme of ice-cold institutional indifference.[149]

Garment announced that this would be an important case in which free press interests would be rolled back in the name of privacy rights. "The press issue that will be drawn into focus by the evidence involves the abuse of the freedom of the press by one of the nation's great publishing institutions."[150] He further stated:

> We charge Time Inc. with having published a false article, falsely dragging the plaintiffs into the news, falsely linking them with a violent, melodramatic work of fiction for commercial purposes . . . We charge this most powerful of all news publications in the world with having done this deliberately, with knowledge of falsity . . . . [I]n order for this case to have any meaning . . . you must render a verdict in the only terms that this defendant understands, and that is in terms of a substantial award of punitive damages . . . . It must be an award of punitive damages that is heard not only in this courtroom but in every editorial room throughout the country. You must award punitive damages in an amount that shocks the newspaper industry.[151]

Playing on public animus against the press was a shrewd tactic; national polls and studies found "public criticism and disapproval" of journalists for intrusive newsgathering and "invasions of privacy."[152]

Garment skillfully portrayed *Life* editor Tom Prideaux as aloof, arrogant and callous. Knowing full well that the Hills were not the "Hilliards," Prideaux and his fellow editors nonetheless made that claim in the article, according to Garment. Prideaux came off as snide and condescending.[153] As Garment recalled in his memoirs, "In perhaps the trial's crowning moment of journalistic insensitivity, Prideaux testified that since there was a 'connection' between the Hill incident and *The Desperate Hours*, *Life* felt 'it was an obligatory thing to do, to point out this connection.' And that, kiddies, is the kind of unguarded hubris that produces chillingly large punitive damage verdicts against the press."[154]

Medical witnesses testified to the severe harm that the *Life* article had caused Mrs. Hill. According to Stanley Dean, Mrs. Hill's psychiatrist, Elizabeth was a vision of "extreme depression and gloom," ex-

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149 GARMENT, *supra* note 5, at 81.

150 Trial Memorandum, at 4, undated, Wilderness Years Collection (on file with the Nixon Presidential Library).

151 Transcript of Record, Time, Inc. v. Hill, *supra* note 147, at 565.

152 Ignaz Rothenberg, *Invasions of Privacy in the Codes of Journalists*, NIEMAN REPORTS Oct. 1959 at 5.

153 GARMENT, *supra* note 5, at 82.

154 *Id.*

pressing "feelings of abject hopelessness . . . [and] uselessness."[155] Dean diagnosed her with "severe reactive depression of psychotic proportions" caused by publicity in *Life*.[156] Elizabeth was receiving electroshock treatments and going to therapy three times a week.[157]

After five hours, the jury entered a verdict in favor of Joseph Hayes.[158] Although Hayes had made arrangements with Prideaux for the article and had helped facilitate the photoshoot, it was clear that he had nothing to do with the content or production of the *Life* article.[159] The jury found against Time, Inc., concluding that *Life* intentionally used the Hills' name and identity falsely, and that because of the intentional falsification punitive damages were justified.[160] They awarded these extraordinarily sympathetic plaintiffs $175,000—$75,000 compensatory damages to Elizabeth Hill and $50,000 for James Hill, and $25,000 in punitive damages to each.[161] It was the largest invasion of privacy judgment in history.[162]

C. Appeal

The decision shocked the publishing world. "Traditionally, newsmen have assumed that stories about a legitimate news event, presented in legitimate fashion, do not constitute invasion of privacy," *Newsweek* observed shortly after the decision.[163] *Life*'s story "seemed harmless enough when *Life* [ran] it, but last week a New York . . . jury ruled that the *Life* article had exposed Mr. and Mrs. Hill, who had not consented to the *Life* story, to illegal invasion of privacy."[164] The size of the award was alarming.[165] With decisions like the one in *Hill*, "New York as the center of the publishing industry will not remain long."[166]

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155 Transcript of Record, Time, Inc. v. Hill, *supra* note 147, at 490.

156 *Id.*

157 *Id.* at 491.

158 *Id.* at 334–36.

159 *Id.*

160 *Id.*

161 Transcript of Record, Hill v. Hayes, *supra* note 8, at 6; *see also* GARMENT, *supra* note 5, at 82.

162 GARMENT, *supra* note 5, at 82.

163 *Critical Question*, NEWSWEEK, Apr. 30, 1962, at 60.

164 *Id.*

165 *E.g.*, Barber v. Time, Inc., 159 S.W.2d 291, 296 (Mo. 1942) (entering judgment for actual damages in the amount of $1,500).

166 Brief of Appellant at 118, Hill v. Hayes, 18 A.D.2d 485 (N.Y. App. Div. 1963).

In 1963 Time, Inc.'s lawyers appealed to the state's intermediate court.[167] Medina now admitted that there were errors in *Life*'s reporting but insisted that they were incidental and negligent, a product of hasty reporting, inevitable in the fast-paced publishing world. The trial judge had told the jury that it was to determine whether *Life* had "altered or changed the true facts concerning plaintiffs' relationship to *The Desperate Hours*, so that the article . . . constituted . . . a fictionalized version . . . to amuse, thrill, astonish or move the reading public so as to increase the circulation of the magazine."[168] If the instruction were correct—that *any* alteration of true facts, however benign or slight, rendered material fictionalized and unprotected by the news privilege—"the guaranty of a free press would be emasculated," Medina argued.[169] "Should Time, Inc. be required to pay $175,000 in damages because it said it 'reenacted' . . . when it should have said 'based,' or 'inspired' when it should have said 'triggered'?" he asked. "The day that judgments in a right of privacy action can be upheld on semantic distinctions of that illusory nature is the day that a free press becomes a thing of the past."[170]

In May 1963 the appeals court affirmed Time Inc.'s liability, though it remanded the case for a retrial on damages, which it deemed excessive.[171] Judge Bernard Botein, a noted free speech advocate, dissented; though there were inaccuracies in the article, its overall gist was true and "newsworthy," he argued.[172] "Can it be said that [the] flaws are of so extravagant a nature as to convert into fiction an informative presentation of legitimate news? In my opinion not; we are in a domain where 'the lines may not be drawn so tight as to imperil more than we protect.'"[173] The new trial on damages yielded $30,000 in compensatory damages for James Hill.[174] Garment, concerned that the Hills would go empty-handed in the event of a successful appeal, had settled with the publisher for $60,000 on Mrs. Hill's claim.[175]

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167 Hill v. Hayes, 18 A.D.2d 485, 486 (N.Y. App. Div. 1963).

168 Time, Inc. v. Hill, 385 U.S. 374, 394–95 (1967).

169 Brief of Appellant at 118, Hill v. Hayes, 18 A.D.2d 485 (N.Y. App. Div. 1963).

170 *Id.* at 56.

171 *Hill*, 18 A.D. 2d at 490.

172 *Id.* at 492–93 (Botein, P.J., dissenting) (internal citations omitted); *see also* Bernard Botein, Book Review, 67 HARV. L. REV. 920, 922 (1954) (reviewing HAROLD L. CROSS, THE PEOPLE'S RIGHT TO KNOW. LEGAL ACCESS TO PUBLIC RECORDS AND PROCEEDINGS (1953)) (stressing the importance of freedom of the press in court proceedings).

173 *Hill*, 18 A.D. 2d at 493 (Botein, P.J., dissenting).

174 Time, Inc. v. Hill, 385 U.S. 374, 417 (1967).

175 Memorandum from Leonard Garment to Richard Nixon, Wilderness Years Collection (May 28, 1967) (on file with the Nixon Presidential Library).

Time, Inc.'s publisher and top editors were deeply troubled by the case.[176] The judgment brought out how devastating privacy law could be to the publishing industry. *Hill* was turning into a crucial piece of litigation, one that Time, Inc. was willing to pursue to the fullest, irrespective of expense, to clarify the law of privacy and establish important precedent. *Time, Inc. v. Hill* had become a test case.[177]

IV. PRIVACY AND FREE SPEECH

To understand what happened next in *Time, Inc. v. Hill*, we need to understand its social context. In the 1950s and 60s, historical exigencies pushed privacy and free speech to the forefront of popular consciousness. Amidst the turbulence and social change of the postwar era, Americans were discovering the importance of privacy and also embracing the virtues of free expression.

After the Second World War, America became an affluent society. The gross national product increased about 250%, and the median family income almost doubled.[178] White-collar career opportunities multiplied with the expansion of corporations, and in 1956, for the first time, the number of white-collar jobs outnumbered blue-collar jobs.[179] Prosperity birthed a rising sense of individual possibility among the middle class.[180] In a nation that had triumphed in the war and that had achieved an unprecedented standard of living, there was a feeling of "limitless hopes and . . . opportunities."[181] In this individual-centered, rights-oriented society, privacy and free expression were both cast as critical personal rights. Both were aspects of the freedom and autonomy that were being described as the essence of democracy and the American Dream of self-enhancement, self-transformation, and self-determination.[182]

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176 *See* THOMPSON, *supra* note 30, at 143.

177 *Id.*

178 DAVID FARBER, THE AGE OF GREAT DREAMS: AMERICA IN THE 1960S, at 8 (1994).

179 WINI BREINES, YOUNG, WHITE, AND MISERABLE: GROWING UP FEMALE IN THE FIFTIES 4 (1992).

180 FARBER, *supra* note 178, at 64–65.

181 *Id.* at 17.

182 *See* BREINES, *supra* note 179 at 2–6 ("[T]here was a pleased consensus that America was the richest and most successful nation on earth."); *see generally* HOWARD BRICK, AGE OF CONTRADICTION: AMERICAN THOUGHT AND CULTURE IN THE 1950S (1998) (discussing the changes in American life throughout the 1950s); ELAINE TYLER MAY, HOMEWARD BOUND: AMERICAN FAMILIES IN THE COLD WAR ERA (1988) (detailing the American response to political insecurities through the lens of privacy and security); DOUGLAS T. MILLER & MARION NOWAK, THE FIFTIES: THE WAY WE REALLY WERE (1975) (surveying the cultural and political history of the United States during the 1950s).

A. Privacy

Although Americans had long been concerned with privacy, the issue became a major national focus after the Second World War.[183] Privacy concerns were aired in an "astonishing variety of locations," ranging from journalistic exposes to television programs, law review articles, films, Supreme Court decisions, poems, novels, and autobiographies, writes privacy scholar Deborah Nelson.[184] A "privacy panic" ensued as many feared the erosion of their privacy at the hands of the government, the media, and private industry.[185]

The technological developments of World War II had yielded a host of new devices that could penetrate privacy. As *U.S. News and World Report* noted in 1955, "cigarette-pack-size transmitter[s] operated by battery, hidden in a room or car" could "beam conversations to receivers a quarter of a mile away," "parabolic microphones . . . could pick up conversations 300 miles away," and "wire recorder[s] hidden in a briefcase or pocket" were being used with "tiny, concealed microphones" known as "'bugs.'"[186] Beginning in the early 1950s there was a major public dialogue around wiretapping as journalistic and government investigations uncovered the extent of the practice.[187] With the use and popularization of surveillance devices in the growing private detective industry, by the government, retail stores, and among the general public, "people are beginning to wonder whether personal privacy is a thing of the past."[188]

Population growth, geographic mobility in the automobile age, the rise of consumer credit, and the expansion of social services created the need for public and private institutions to monitor and track

183 On Americans' historical concerns with privacy, see FREDERICK S. LANE, AMERICAN PRIVACY: THE 400-YEAR HISTORY OF OUR MOST CONTESTED RIGHT 153 (2009) (recounting the history of the American public's interest in privacy rights).

184 DEBORAH NELSON, PURSUING PRIVACY IN POSTWAR AMERICA xiv (2002).

185 *See* Samantha Barbas, *Saving Privacy from History*, 61 DEPAUL L. REV. 973, 1021–22 (2012) (tracking privacy concerns post World War II).

186 *Gadgets with Big Ears*, U.S. NEWS & WORLD REPORT, Apr. 22, 1955, at 46–48.

187 *See, e.g.*, David Boroff, *No Place to Hide*, SATURDAY REV., Mar. 21, 1964, at 47 (reviewing VANCE PACKARD, THE NAKED SOCIETY (1964) and MYRON BRENTON, PRIVACY INVADERS (1964), two books discussing invasion of privacy); Vance Packard, *The Walls Do Have Ears*, N. Y. TIMES MAGAZINE, Sept. 20, 1964, at 23 (discussing wire taps as a threat to privacy); Bernard Spindel & Bill Davidson, *Who Else is Listening*, COLLIER'S, June 10, 1955, at 25 (explaining the history of eavesdropping via wiretap).

188 David L. Cohn, *A Businessman Under Every Bed*, SATURDAY REV., July 15, 1950, at 15–16 (describing the use of surveillance devices to collect data by businesses).

individuals.[189] Large private and governmental investigative systems were devoted to amassing personal dossiers on millions.[190] Material was obtained through "personal interviews, lie-detector tests, wiretapping, electronic bugging and even, in some rare cases, by the use of truth drugs," noted *Life* magazine in a piece titled "What Happened to Our Privacy?"[191] The compilation of these files was aided by computers, which had recently come into use. Wrote Alan Westin in his 1967 work *Privacy and Freedom*, consulting these dossiers "has become the method by which a large organization makes judgments about people when it wants to hire or fire them, lend them money, or give them passports to travel abroad."[192] Social scientists were discussing the possibility of keeping central files of standardized photographs of the entire population.[193] "And, of course, these photographs will be in the nude," predicted anthropologist Ashley Montagu in 1956. "Thus will the last of our privacies be stripped from us." [194]

The media's invasions of privacy had become more pervasive and nefarious. Reporters were said to be using wiretaps and surreptitious recording devices, closed-circuit television and other miniaturized cameras, in addition to climbing fire escapes and posing "as detectives, coroners' assistants, or other public or semi-public officials to gain access to places from which they otherwise would be barred."[195] Critics lamented the trend towards "thrust[ing] a microphone under the chin of a woman who has watched her child being injured and urg[ing] her to tell the viewers how she feels."[196] One commentator noted NBC's "remorseless focusing" on sustained close-ups of bleeding corpses and incidents in which the family members of murder victims were pursued and assaulted by television reporters.[197] "Public opinion, in growing degree, angrily reacts to violations of privacy by journalists," noted one media critic.[198]

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189 Robert Wallace, *What Happened To Our Privacy*, LIFE, Apr. 10, 1964, at 11, (reviewing VANCE PACKARD, THE NAKED SOCIETY (1964) and MYRON BRENTON, PRIVACY INVADERS (1964)).

190 *Id.*

191 *Id.*

192 ALAN F. WESTIN, PRIVACY AND FREEDOM 159 (1967).

193 Ashley Montagu, *The Annihilation of Privacy*, SATURDAY REV., Mar. 31, 1956, at 10.

194 *Id.*

195 Willard H. Pedrick, *Privacy and Publicity: Is It Any of Our Business?* 20 U. TORONTO L. J. 391, 391 (1970).

196 WESTIN, *supra* note 192, at 55–56.

197 Jack Gould, *A Matter of Taste: Television Coverage of Recent News Events Called 'Gruesome, Nauseating'*, CORPUS CHRISTI CALLER-TIMES, Sept. 8, 1963, at 8H.

198 Rothenberg, supra note 152, at 7.

Privacy was a matter of concern because of the growing threats to it; it was also becoming more of an issue because people had more of it, and felt more entitled to it. America was becoming, in a sense, a "privatized" society, and the focus of American life was turning inward. In the middle-class ethos of the time, success and fulfillment were not to be found in public life and civic involvement, as they once had been, but in the world of the personal, intimate, and domestic—one's family, home, relationships, and material possessions.[199] As people spent more time enjoying the fruits of national affluence—in their cars and their new suburban homes, in their living rooms watching television, amassing personal possessions—the private life had become the "good life." In a society where relative seclusion and limited engagement in public life had become a reality for millions, privacy was a value seen as especially crucial and worth protecting.

Privacy was not just the right to be "let alone." "Privacy" was described as a sweeping right to personal autonomy, a right that seemed fragile and evanescent in a standardized mass society dominated by large, impersonal business and government institutions. The essence of privacy was the protection of personal "independence," wrote law professor Edward Bloustein in 1965, and invasions of privacy, whether by the government or the media, were a serious offense to "the right of the individual to be self-determining. . . ."[200] Privacy was the individual's "rightful claim . . . to determine the extent to which he wishes to share himself with others. . . ."[201] The right "to determine . . . when, how, and to what extent information about [oneself] is communicated to others" was an essential instrument for achieving individual "freedom."[202]

B. Free Expression

At the same time American culture was embracing privacy, it was becoming sensitive to the value of free expression. Like the right to privacy, freedom of personal expression was bound up with the au-

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199 *See* August Heckscher, *The Invasion of Privacy (2): The Reshaping of Privacy*, 28 AM. SCHOLAR 11 16–17 (1958).

200 Edward J. Bloustein, *Privacy, Tort Law, and the Constitution: Is Warren and Brandeis's Tort Petty and Unconstitutional As Well*, 46 TEX. L. REV. 611, 620 (1968).

201 ADAM CARLYLE BRECKENRIDGE, THE RIGHT TO PRIVACY 1 (1970); *see also* Oscar M. Ruebhausen & Orville G. Brim, Jr., *Privacy and Behavioral Research*, 65 COLUM. L. REV. 1184, 1188–89 (1965) (stating that "there is another, and obverse, facet of the claim to privacy," described as "the right to share and to communicate").

202 WESTIN, *supra* note 192, at 7, 42.

tonomy, growth and enhancement of the individual. As one legal scholar observed in 1963, free expression—self-expression—was essential to personal authenticity and "self-realization."[203] Memoirs, talk show confessions, and other genres of self-exposure became staples of popular culture;[204] various political, social, and lifestyle movements, from the feminist movement to the antiwar movement to the counterculture, turned self-expression into a form of rebellion, a political statement, and even a fashionable style.[205]

Freedom of speech became a rallying cry in the emerging culture of political protest and dissent. In the 1950s, McCarthyism, the House Un-American Activities Committee, and the postwar Red Scare had made dissenting, "subversive" expression a crime, and this bred a political backlash.[206] In the early 1960s, a student free speech movement began, protesting universities' efforts to quash expression on campus.[207] Free expression became a contested issue in the civil rights movement, as Southern authorities used violence to quash pickets, sit-ins, and other public protests.[208] By the end of the 1960s, mass demonstrations against the Vietnam War occupied the streets, spawning violent acts of retribution.[209] Political criticism was described as a "public duty."[210] Despite widespread concerns with media invasions of privacy, the crusading, muckraking journalist, risking his life to expose official abuse and corruption, was romanticized in the popular culture of the time.[211]

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203 Thomas I. Emerson, *Towards a General Theory of the First Amendment*, 72 YALE L.J. 877, 879 (1963).

204 *See generally* CHRISTOPHER LASCH, THE CULTURE OF NARCISSISM: AMERICAN LIFE IN THE AGE OF DIMINISHING EXPECTATIONS (1979).

205 On the ideal of "assertive individuality," see BRICK, *supra* note 182, at 69 (recounting the assertive individuality driving the counter-culture movements of the 1960s).

206 ELLEN SCHRECKER, MANY ARE THE CRIMES: MCCARTHYISM IN AMERICA (1998).

207 ROBERT COHEN, FREEDOM'S ORATOR: MARIO SAVIO AND THE RADICAL LEGACY OF THE 1960S 226 (2009).

208 On the civil rights movement, see TAYLOR BRANCH, PARTING THE WATERS: AMERICA IN THE KING YEARS, 1954–1963 (1988); ROBERT WEISBROT, FREEDOM BOUND: A HISTORY OF AMERICA'S CIVIL RIGHTS MOVEMENT (1990).

209 On the protest movements of the 1960s, see generally THE FREE SPEECH MOVEMENT: REFLECTIONS ON BERKELEY IN THE 1960S (Robert Cohen & Reginald Zelnik eds., 2002) (reflecting on the origins and impact of the Free Speech Movement at Berkeley in the 1960s); DAVID LANCE GOINES, THE FREE SPEECH MOVEMENT: COMING OF AGE IN THE 1960S (1993) (recounting the Free Speech Movement at Berkeley in the 1960s); SPEAKING OUT: ACTIVISM AND PROTEST IN THE 1960S AND 1970S (Heather Ann Thompson ed., 2010) (describing the cultural and political protest movements in the 1960s and 1970s).

210 *See* New York Times v. Sullivan, 376 U.S. 254, 295 (1964) (Black, J., concurring).

211 Amy Gajda, *Judging Journalism: The Turn Toward Privacy and Judicial Regulation of the Press*, 97 CALIF. L. REV. 1039, 1063, 1068 (2009) (contrasting today's criticisms of journalists with their heroic image in the 1960s).

The Supreme Court's decisions reflected these concerns. Between the end of World War II and the 1970s the Court reviewed more free speech cases than in the entire history of the Constitution.[212] The issues reflected the fractured cultural climate—the Court heard cases on the speech rights of accused communists, the right to engage in sexually explicit speech, and the right to protest in public places, among other topics. The Supreme Court under Earl Warren pioneered a number of modern speech-protecting doctrines, including freedom of association, academic freedom, the right to receive information and ideas, the public forum, and vagueness and overbreadth.[213] The Court "brought whole categories of expression within the ambit of the free speech clause for the first time—expression that had historically been assumed to be beyond the pale of constitutional protection," writes Nadine Strossen.[214] "More consistently than other Courts before or since, the Warren Court approached free speech questions from the perspective that freedom of expression is a preferred constitutional value."[215]

V. *SULLIVAN*, *GRISWOLD*, AND NIXON

In March 1964, the Supreme Court handed down its landmark decision in *New York Times Co. v. Sullivan*.[216] In *Sullivan*, the Court constitutionalized and restricted the law of libel, noting the "chilling effect" of defamation judgments on news publishing and free expression.[217] Only a year later, in *Griswold v. Connecticut*,[218] the Court recognized a general right to privacy in the Constitution. By elevating its issues to a constitutional plane, these decisions transformed the *Hill* case.

A. Sullivan

New York Times v. Sullivan grew out of the violence of the civil rights struggle. L.B. Sullivan, an elected city commissioner of Montgomery, Alabama who supervised the police department, brought suit

212 *See* Nadine Strossen, *Freedom of Speech in the Warren Court*, *in* THE WARREN COURT: A RETROSPECTIVE, 68, 71–72 (Bernard Schwartz ed., 1996) (("[T]he Warren Court protected expression to an unprecedented degree.") (internal quotation marks omitted)).

213 *Id.* at 68–69; Harry Kalven, Jr., *"Uninhibited, Robust, and Wide Open"—A Note on Free Speech and the Warren Court*, 67 MICH. L. REV. 289, 295 (1968).

214 Strossen, *supra* note 212, at 69.

215 *Id.* at 71.

216 376 U.S. 254 (1964).

217 *Id.* at 300 (Goldberg, J., concurring).

218 381 U.S. 479 (1965).

against the *New York Times* ("*Times*"), claiming that he had been libeled by a full-page advertisement in the *Times*, created by a civil rights group, depicting violence against blacks by the Montgomery police.[219] The ad contained a few minor errors, and the *Times* had published it without checking its accuracy.[220] An Alabama trial court held that there had been a libel and the Alabama Supreme Court affirmed a judgment of half a million dollars against the *Times*.[221]

In a 9-0 decision for the *Times*, written by Justice William Brennan, the Court reversed the judgment on First Amendment grounds.[222] Under the common law, libel had been a strict liability tort.[223] It was also based on a presumption of falsity—a defamatory statement was assumed to be false unless the defendant proved it true.[224] Eliminating the strict liability rule in cases involving libels of public officials, the Court announced that criticism of public officials containing errors of fact was protected under the Constitution provided the errors were not made with "actual malice"—"reckless disregard" of the truth.[225]

"[E]rroneous statement is inevitable in free debate, and . . . must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive,'" Brennan wrote.[226] Newspapers would cease reporting on controversial issues if careless errors opened them up to liability. The presumption of falsity also burdened the right to engage in political criticism. "Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so."[227] Brennan described the common law rules of civil libel as akin to crime of seditious libel, an unconstitutional relic of the 18th century.[228] The public's right to

219 *Sullivan*, 376 U.S. at 254.

220 *Id.* at 258–59.

221 *See id.* at 256 (describing the procedural history of the case); ANTHONY LEWIS, MAKE NO LAW: THE SULLIVAN CASE AND THE FIRST AMENDMENT 35 (1991) ("The $500,000 awarded to Sullivan was the largest libel judgment in Alabama history, and enormous by the standards of verdicts anywhere in the country at the time . . . .").

222 *Sullivan*, 376 U.S. at 256, 292.

223 *Id.* at 262.

224 *Id.*

225 *Id.* at 280.

226 *Id.* at 271–72 (citations omitted).

227 *Id.* at 279.

228 *Id.* at 273–77.

freely criticize its leaders, Brennan concluded, was the "central meaning" of the First Amendment.[229]

Sullivan constitutionalized the law of libel.[230] The Court rejected Sullivan's claim that the First and Fourteenth Amendments did not apply to a state libel judgment.[231] "[L]ibel can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment."[232] After *Sullivan*, public officials suing for libel over statements about their official conduct had to prove that the statement was false and published with reckless disregard of the truth. The Court constitutionalized a common law privilege that had been recognized in some states and that was most clearly enunciated in a 1908 Kansas decision, *Coleman v. MacLennan*.[233]

Brennan, appointed to the Court in 1956, was a formerly obscure New Jersey Supreme Court justice who became arguably the most important intellectual influence on the Warren Court.[234] Brennan was the only member of the Court's "liberal majority capable of acting as principal doctrinalist, and he may have been the only one to care about theory and doctrine," note historians Kermit Hall and Melvin Urofsky.[235] Even before *Sullivan*, Brennan was a staunch defender of freedom of speech.[236] In 1958, at the height of the Red

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229 *Id.* at 273; *see also* Harry Kalven, Jr., *The New York Times Case: A Note on the "Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191, 209 (1964) ("The central meaning of the Amendment is that seditious libel cannot be made the subject of government sanction.").

230 Historically, libel law had been left to the states; it was the "operative rule of constitutional law" that state libel laws raised no federal constitutional issues. *Cf.* Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942) (noting that restrictions on libelous speech have "never been thought to raise any Constitutional problem"); LUCAS A. POWE JR., THE WARREN COURT AND AMERICAN POLITICS 308–09 (2000) (noting that libel law had long been determined by the states).

231 *Sullivan*, 376 U.S. at 264.

232 *Id.* at 269. The Court found state action in the application of the Alabama law that was violative of free speech. *Id.* at 264–65.

233 *See* Coleman v. MacLennan, 98 P. 281, 281–82, (Kan. 1908) (holding that derogatory and false statements are protected so long as they are made "in good faith, and without malice").

234 SETH STERN & STEPHEN WERMIEL, JUSTICE BRENNAN, LIBERAL CHAMPION xiii (2010) ("No one could have predicted that Brennan would become the most forceful and effective liberal ever to serve on the Court.").

235 HALL & UROFSKY, *supra* note 122, at 165.

236 *See* Geoffrey R. Stone, *Justice Brennan and the Freedom of Speech: A First Amendment Odyssey*, 139 U. PA. L. REV. 1333, 1333–41 (1991) (detailing some of Justice Brennan's many opinions supporting expansive free speech rights). During his thirty-four years on the Court, Brennan was 50% more likely than the Court as a whole to protect freedom of speech. *Id.* at 1334.

Scare, the Court heard *Speiser v. Randall*,[237] involving a state law requiring a veteran to show that he had not advocated the overthrow of government as a condition for receiving government benefits. Putting the burden of proof on the applicant, Brennan concluded, had a "chilling effect" on speech— " the man who knows that he must bring forth proof and persuade another of the lawfulness of his conduct necessarily must steer far wider of the unlawful zone than if the State must bear these burdens."[238] "First Amendment freedoms need breathing space to survive," he wrote.[239]

Brennan's *Sullivan* opinion was influenced by the political theorist Alexander Meiklejohn, who believed that the purpose of the First Amendment was to safeguard "public discussions of public issues" for the purpose of democratic self-government.[240] Meiklejohn defined speech on public issues, or speech of "governing importance," broadly; it incorporated a wide range of material including philosophy, art, literature, and entertainment.[241] Within this area, protections were absolute.[242] Libelous speech about private citizens, obscenities, or incitement—"shouting fire in a crowded theater"—were "private speech," not relevant to public discourse and unprotected by the First Amendment.[243]

In *Sullivan*, Brennan described speech on public affairs—specifically, politics and political criticism—as the core of the First Amendment.[244] This was narrower than Meiklejohn's domain. Even within this realm, free speech protections were qualified. Unlike Meikeljohn, Brennan thought that some speech on "governing matters" could be restricted; the state's interest in protecting personal reputation, even the reputations of public figures, was not to be dis-

237 357 U.S. 513 (1958).

238 *Id.* at 526.

239 NAACP v. Button, 371 U.S. 415, 433 (1963).

240 Alexander Meiklejohn, *The First Amendment is An Absolute*, 1961 SUP. CT. REV. 245, 257 (1961); *see also* William J. Brennan, Jr., *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1, 11–12 (1965) (arguing that Meiklejohn believed "[f]reedom of expression in public affairs is an absolute"); *see generally* ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF GOVERNMENT (1948) (expounding Meiklejohn's conception of free speech).

241 *See* Brennan, *supra* note 240, at 13 (describing areas of speech which Meiklejohn believed fell within the category of speech of "governing importance").

242 *See id.* at 12 ("Freedom of expression in areas of public affairs is an absolute.").

243 *See id.* at 13 (describing areas of speech which Alexander Meikeljohn believed fell outside the category of speech of "governing importance"); White, *supra* note 66, at 347–48 (1996) (same).

244 See New York Times Co. v. Sullivan, 376 U.S. 254, 269 (1964) (stating that "free political discussion" is a "fundamental principle of our constitutional system").

regarded.[245] While Meiklejohn would have done away with liability for libels of public officials, *Sullivan* limited recovery but did not eliminate it. As Hall and Urofsky write, Brennan embraced "a technique of conceding in principle the government's power to pursue its objective, while at the same time making it extraordinarily difficult [for the government] to do so."[246]

Per the parlance of the day, Brennan was a First Amendment "balancer." The Supreme Court's free speech jurisprudence in the 1960s was marked by a debate between absolutists, who took the First Amendment's guarantees as unqualified, and balancers, who weighed the interest in free expression against the government's interests in restricting speech.[247] "Ad hoc" balancers weighed the interests in free expression in any given case against the social interest sought by the regulation restricting expression.[248] "Definitional balancers" put speech into categories and genres, then weighed the worth of the category against the state's interest in restricting it.[249] Definitional balancers employed balancing "not for the purpose of determining which litigant deserves to prevail in the particular case, but only for the purpose of defining which forms of speech are to be regarded as 'speech' within the meaning of the first amendment," in the words of law professor Melville Nimmer.[250] Brennan employed definitional balancing in *Sullivan*, concluding that libels on public officials were unprotected if made with reckless disregard of the truth.[251]

Hugo Black was the most outspoken proponent of First Amendment absolutism.[252] Black, a former Senator from Alabama appointed to the Court in 1937, described the Constitution as his "legal bible. . . . I cherish every word of it, from the first to the last, and I personally deplore even the slightest deviation from its least important commands."[253] "Nothing that I have read in the Congressional de-

245 LEVINE & WERMIEL, *supra* note 5, at 19 (noting that Brennan "thought that weight should be properly given to the reputation of the targets of defamatory falsehoods").

246 HALL & UROFSKY, *supra* note 122, at 164.

247 Emerson, *supra* note 203, at 912–16 (describing the two schools of thought).

248 *Id.* The champion of this approach on the Court had once been Felix Frankfurter; after Frankfurter retired from the Court in 1962, its leading exponent was John Marshall Harlan. *See id.* at 912 n.37 (noting the strongest proponents and opponents of each theory).

249 *Id.* at 878–79.

250 Melville B. Nimmer, *The Right to Speak from* Times *to* Time*: First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CAL. L. REV. 935, 942 (1968).

251 *See id.* (detailing the Court's balancing approach in *Sullivan*).

252 *See* Patrick McBride, *Mr. Justice Black and His Qualified Absolutes*, 2 LOY. L.A. L. REV. 37, 37 (1969) (noting Justice Black's belief that the freedoms guaranteed by the First Amendment are "as clear and unequivocal as a stop light").

253 MORTON J. HORWITZ, THE WARREN COURT AND THE PURSUIT OF JUSTICE 5 (1998).

bates on the Bill of Rights indicates that there was any belief that the First Amendment contained any qualifications."[254] He had "no doubt" that liability for libel was unconstitutional.[255] Black wrote a concurrence in *Sullivan*, joined by Justice William O. Douglas, also an absolutist, in which he agreed with the Court's reversal of the judgment but rejected the actual malice standard. The *Times* had an "absolute, unconditional constitutional right to publish . . . criticisms of the Montgomery agencies and officials," Black argued.[256] "We would, I think, more faithfully interpret the First Amendment by holding that at the very least it leaves the people and the press free to criticize officials and discuss public affairs with impunity."[257]

Within weeks of the *Sullivan* decision, Time, Inc. appealed the *Hill* case to New York's highest court, arguing that "the decision appealed from is in violation of constitutional guaranties of free press and free speech."[258] "As recently stated by the Supreme Court in *New York Times v. Sullivan*, erroneous statement is inevitable in free debate and . . . it must be protected if the freedoms of expression are to have the breathing space that they need to survive."[259] Mere factual error alone "affords no warrant for repressing speech that would otherwise be free."[260] In April 1965, in a per curiam decision, the Court of Appeals affirmed the judgment against Time, Inc.[261]

Time, Inc.'s lawyers immediately announced their intent to appeal to the U.S. Supreme Court, challenging both the publisher's liability and the constitutionality of the New York statute under the First and Fourteenth Amendments.[262] The publishing industry eagerly watched

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254 Hugo L. Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865, 880 (1960); *see also* JAMES MAGEE, MR. JUSTICE BLACK: ABSOLUTIST ON THE COURT (1980) (describing Justice Black's uncompromising position with regard to the First Amendment); Charles L. Black Jr., *Mr. Justice Black, the Supreme Court, and the Bill of Rights*, HARPER'S, Feb. 1961, at 63, (same).

255 *Mr. Justice Black and First Amendment Absolutes: A Public Interview*, 35 N.Y.U. L. REV. 549, 557 (1962) ("I have no doubt myself that the provision, as written and adopted, intended that there should be no libel or defamation law in the United States . . . .").

256 New York Times Co. v. Sullivan, 376 U.S. 254, 293 (1964) (Black, J., concurring).

257 *Id.* at 296. Justice Arthur Goldberg, a liberal Kennedy appointment, wrote a concurrence in which he similarly advocated an "absolute, unconditional privilege to criticize official conduct despite the harm which may flow from excesses and abuses." *Id.* at 298 (Goldberg, J., concurring).

258 Brief of Appellant at 75, Time, Inc. v. Hill, 385 U.S. 374 (1967).

259 *Id* at 77 (citations omitted) (internal quotation marks omitted).

260 Brief of Appellant, Hill v. Hayes, 15 N.Y. 2d. 986 (1965) (citations omitted) (internal citations omitted).

261 *See* Hill v. Hayes, 15 N.Y.2d 986 (1965).

262 *See* Jurisdictional Statement at 2–3, 7–23, Time, Inc. v. Hill, 385 U.S. 374 (1967) (arguing that the statute infringed on the freedom of the press guaranteed by the First and Fourteenth Amendments).

the case. "The question of the extent to which the newly expanded right of privacy "inhibits robust and wide open" debate on "public issues" would inevitably come before the Court, predicted *Publishers' Weekly*. Until then, "authors and publishers will have to continue to walk a tightrope as far as privacy is concerned."[263]

B. Griswold

Only two months after Time, Inc. filed its appeal, the Court issued its decision in *Griswold v. Connecticut*.[264] In June 1965, seven members of the Court, in an opinion by Douglas, invalidated an antiquated Connecticut law forbidding the use and dissemination of birth control as a violation of a newly-articulated constitutional "right to privacy."[265]

The *Griswold* decision reflected the sense of urgency around privacy in 1964–65. In addition to magazine and newspaper articles and television documentaries, several books on the issue appeared, including Myron Brenton's *The Privacy Invaders* and Vance Packard's *The Naked Society*.[266] Exposés warned the public "to wake up not only to the tapped wires and hidden microphones that may be probing into our lives, but to various subtler invasions being conducted by big government, big business, big curiosity, and big fun, as in the "Candid Camera" show."[267] That year a Federal Data Center was proposed that would amass extensive files on every citizen. "The implications of such[] [a] proposal shocks the sensibilities of thinking Americans," noted one editorial.[268] "In our modern age, with all of its intrusive impacts on the individual, traditional concepts of a man's right to privacy are . . . becoming increasingly undermined."[269]

The word "privacy" did not appear in the Constitution, although the Warren Court had recognized a "right to privacy" under different

263 *Libel and Privacy Lines Diverging*, PUBLISHERS WEEKLY, Nov. 1, 1965.

264 381 U.S. 479 (1965).

265 Griswold v. Connecticut, 381 U.S. 479, 494–85 (1965) (holding that the "right of privacy . . . is a legitimate one").

266 *See generally* MYRON BRENTON, THE PRIVACY INVADERS (1964) (discussing the privacy invasions committed by private actors, and arguing that their influence is just as dangerous as invasions committed by the state); VANCE PACKARD, THE NAKED SOCIETY (1964) (discussing how the use and manipulation of technologies by employers, stores, credit bureaus and the government presents a threat to civil liberties).

267 *Assault on Privacy*, AMERICA, Mar. 14, 1964, at 334, 334–35.

268 *Let Me Alone!*, CHRISTIAN CENTURY, Sept. 21, 1966, at 1135, 1136 (citations omitted) (internal quotation marks omitted).

269 *Id.*

provisions of the Bill of Rights. In *Mapp v. Ohio*,[270] the Court referred to the "freedom from unconscionable invasions of privacy"—unwarranted searches and seizures—as protected by the Fourth Amendment.[271] The Court recognized a right to "associational privacy" under the First Amendment in cases involving forced disclosures of group membership lists.[272] Prior to the start of Warren's term in 1953, the term "privacy" appeared in just eighty-eight Supreme Court opinions.[273] The term appeared in 107 opinions during Warren's fifteen-year tenure.[274]

Justice Douglas's opinion in *Griswold* conceded that there was no specifically enumerated "right to privacy" but spoke of "zones of privacy" created by various guarantees of the Bill of Rights.[275] "Specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance."[276] In addition to the Fourth Amendment, the Fifth Amendment protected citizens against "governmental invasions 'of the . . . privacies of life.'"[277] The Third Amendment's prohibition against the quartering of soldiers without consent was another aspect of constitutionally protected privacy.[278] The First Amendment protected the "privacy" of one's political associations, and also the "freedom of inquiry . . . thought, and freedom to teach"—intellectual privacy.[279] Douglas concluded that the Connecticut statute infringed upon a right to privacy—a right to "marital privacy," a form of "associational privacy"—contained within the "penumbral emanations" of "several fundamental constitutional guarantees."[280] "We deal with a right of privacy older than the Bill of Rights . . . . Marriage is a coming together for better or for worse . . . it is an association for as noble a purpose as any involved in our prior decisions."[281]

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270 367 U.S. 643 (1961).

271 *Id.* at 657.

272 Shelton v. Tucker, 364 U.S. 479, 485–86 (1960) (holding that an Arkansas statute requiring teachers to disclose every organization to which they belonged unconstitutionally impaired teachers' freedom to associate); NAACP v. Alabama, 357 U.S. 449, 462 (1958) ("Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association . . . .").

273 LANE, *supra* note 183, at 153.

274 *Id.*

275 Griswold v. Connecticut, 381 U.S. 479,484–85 (1965).

276 *Id.*

277 *Id.* (quoting Boyd v. United States, 116 U.S. 616, 630 (1886)).

278 *Id.* at 484.

279 *Id.* at 482–83 (citations omitted).

280 *Id.* at 484–86.

281 *Id.* at 486.

Just as *Sullivan* agitated the debate between absolutists and balancers, *Griswold* fueled the dispute over "incorporation"—which guarantees of the Bill of Rights were made applicable to the states through the due process clause of the Fourteenth Amendment, and whether the due process clause protected 'fundamental rights' not specifically elaborated in the Bill of Rights. Douglas's opinion suggested that the Fourteenth Amendment protects only the rights guaranteed by the letter or the 'penumbras' of the Bill of Rights.[282] Arthur Goldberg's concurrence, joined by Warren and Brennan, agreed that the Connecticut birth-control statute intruded upon the right of "marital privacy" but described privacy as a right protected by the due process clause.[283] Concurring, John Marshall Harlan and Byron White also rested their case on the due process clause.[284]

Black, dissenting, denied the existence of a right to privacy in the Bill of Rights. An outgrowth of his constitutional literalism, he rejected the Court's attempt to formulate rights not founded in specific constitutional guarantees.[285] As he wrote in *Griswold*,

> I get nowhere in this case by talk about a constitutional 'right of privacy' as an emanation from one or more constitutional provisions. I like my privacy as well as the next one, but I am nevertheless compelled to admit that government has a right to invade it unless prohibited by some specific constitutional provision.[286]

The due process argument claimed for the judiciary the "power to invalidate any legislative act which the judges find irrational, unreasonable or offensive."[287] In a footnote, Black accused Douglas of attempting to elevate the tort of privacy into a constitutional doctrine:

> [T]his Court, which I did not understand to have power to sit as a court of common law, now appears to be exalting a phrase which Warren and Brandeis used in discussing grounds for tort relief, to the level of a con-

282 *Id.* at 484–86.

283 *Id.* at 486 (Goldberg, J., concurring).

284 *Id.* at 449 (Harlan J., concurring); *id.* at 502 (White J., concurring); *see also* JOHN W. JOHNSON, *GRISWOLD V. CONNECTICUT*: BIRTH CONTROL AND THE CONSTITUTIONAL RIGHT OF PRIVACY (2005) (giving a general exposition of the issues addressed in *Griswold*); Paul G. Kauper, *Penumbras, Peripheries, Emanations, Things Fundamental and Things Forgotten: The* Griswold *Case*, 64 MICH. L. REV. 235 (1965) (explaining that Harlan and White found the Connecticut statute unconstitutional on the grounds that it violated the due process clause of the Fourteenth Amendment).

285 In his dissent in *Adamson v. California*, he had argued that the Fourteenth Amendment made all of the Bill of Rights applicable to the states and that there was no basis for a judicial formulation of any other fundamental rights. This was his "total incorporation" concept. 332 U.S. 46, 74–75 (1947) (Black J., dissenting).

286 *Griswold*, 381 U.S. at 509–10 (Black, J., dissenting).

287 *Id.* at 511.

> stitutional rule which prevents state legislatures from passing any law deemed by this Court to interfere with 'privacy.'[288]

Griswold, like *Sullivan*, was a popular decision. A survey showed that most Americans thought the "decision was correct in viewing privacy as a right that [was] fundamental to their way of life."[289] The vague Douglas opinion left critical legal questions unanswered, however. Did the new right to privacy extend beyond "marital privacy"? In which constitutional provisions did it reside? Which government interests, if any, trumped the right to privacy? The significance of *Griswold* for the Hills' lawyers was that it elevated "privacy" to the status of a general constitutional right. The conflict between privacy and freedom of the press could now be framed as a clash between two constitutional values.

D. Nixon

It was around this time that Richard Nixon became involved with the *Hill* case. In 1963, the former Vice President joined the Mudge law firm, which subsequently renamed itself Nixon, Mudge, Rose, Guthrie, and Alexander.[290] Nixon had served as Vice-President for two terms under Eisenhower in the 1950s, unsuccessfully ran for president against John F. Kennedy in 1960, and failed in his attempt to become California's governor in 1962. He blamed these losses, in part, on the press. In 1962, after losing the governor's race, he gave what he called his "last press conference."[291] The press had hounded Nixon since the beginning of his political life in the 1940s.[292] Nixon accused the press of torpedoing his career and announced that he was leaving politics and that the press wouldn't have "Nixon to kick around anymore."[293] This spiteful attack was a public relations disaster; "barring a miracle," said *Time* magazine, Nixon's political career was over.[294]

Nixon then sought to reinvent himself as a corporate lawyer. Nixon had attended Duke Law School and had practiced law briefly be-

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288 *Id.* at 510 n.1 (1965).

289 WESTIN, *supra* note 192, at 355.

290 JONATHAN AITKEN, NIXON: A LIFE 363–64 (1993).

291 RICHARD NIXON, SPEECHES, WRITINGS, DOCUMENTS 112 (Rick Perlstein, ed., 2008).

292 John Aloysius Farrell, *When Nixon Met the Press*, POLITICO.COM, Aug. 6, 2014, http://www.politico.com/magazine/story/2014/08/nixon-and-the-media-109773.

293 NIXON, *supra* note 291, at 112.

294 *Id.* at xxxvi.

fore entering politics.[295] Through connections, Nixon was introduced to the head of Mudge and brought into the organization as a "public partner," to drum up business for the then-declining firm.[296] Nixon joined Mudge because he needed to make money, and also because he felt that the firm could serve as a launching pad for his ongoing political ambitions.[297] Nixon sought to return to politics, perhaps even to make a run for the presidency, but he was unsure whether he could rehabilitate his tarnished public image.[298] Leonard Garment and several other lawyers at Mudge became part of an impromptu campaign team for Nixon beginning in 1964.[299] The law firm was sympathetic to Nixon's aspirations and gave him plenty of time for his political activities.[300]

In 1965 and 1966, Nixon flew around the country campaigning for Republican candidates, gave lectures worldwide, and tried to establish the base for a return to politics.[301] At the same time, he took his law work seriously. Writes biographer Stephen Ambrose, Nixon went at his law job "the way he went after political office, aggressively, with an equal emphasis on hard work and personal contacts." "Nixon the corporate lawyer was as instant a success as he had been as Nixon the politician. . . . In the short period he spent as an active lawyer, Nixon demonstrated that he could have reached the pinnacle in corporate law practice as well as in politics."[302] Nixon described his time in New York as his "Wilderness Years," in which he fought for his political reincarnation. Observes biographer Jonathan Aitken, "the key elements in that fight were achieving professional success in the legal world . . . exercising astute judgment to position himself in the centre

295 STEPHEN E. AMBROSE, 2 NIXON: THE TRIUMPH OF A POLITICIAN, 1962–1972, at 73–84, 87–91, (1989).

296 The move was covered widely in the press. *See, e.g.*, *Nixon is Reported Joining Firm Here*, N.Y. TIMES, May 2, 1963, at 1, 25 (reporting on Nixon's planned move to join Mudge); *Nixon Says He May Move to New York*, L.A. TIMES, May 2, 1963, at 2 (discussing Nixon's potential "business ventures" in New York).

297 Nixon denied this motivation, however. "As for using New York as a base for politics, or interjecting myself into local politics, you may quote me as saying emphatically it is not so . . . . I am not coming to New York for any political reason whatsoever." *Nixon Says He May Move to New York*, *supra* note 296, at 2.

298 AITKEN, *supra* note 290, at 307.

299 GARMENT, supra note 5, at 99–102.

300 On Nixon's law practice in New York, see AMBROSE, *supra* note 295, at 17 (detailing Nixon's reasons for choosing to work at a private law firm in New York); GARMENT, *supra* note 5, at 59 (discussing Nixon's use of the law firm as the base for his political activities); HOFFMAN, *supra* note 42, at 106 (discussing Nixon's ability to harness the resources of the law firm for his political future).

301 GARMENT, *supra* note 5, at 109.

302 AMBROSE, *supra* note 295, at 24–25.

of the Republican hierarchy[,] and campaigning like a warrior in the cause of his party during the leanest of lean years."[303] Nixon "prepared himself for his comeback with the discipline of a former heavyweight champion returning to the ring."[304]

Sometime in 1964, Garment hit upon the *Hill* case as a possible vehicle for Nixon's rehabilitation. Garment recalled the first time he mentioned the *Hill* case to Nixon. It was after the trial had taken place and during the appellate process. "Nixon listened carefully to my description of the case," Garment recalled.[305]

> The magazine wasn't out to injure the Hills, he remarked; it just didn't give a good goddamn about them. It was only interested in selling its goddamn magazine. That's what makes it so infuriating, he went on. All that fancy First Amendment talk—just a lot of pious bullshit while they exploit the hell out of you.[306]

Garment envisioned Nixon arguing the case before the Supreme Court. While Garment would remain involved in *Hill*, doing much of the research and brief-writing, Nixon would serve as *Hill*'s public face.[307] This could cast Nixon in a new light, as a principled champion of constitutional values and a crusader for the besieged privacy rights of ordinary Americans, rather than the rejected politician and "sore loser."[308]

Nixon realized that there were advantages and drawbacks to becoming involved in *Time, Inc. v. Hill*. The case would pit him against one of the most powerful publishing empires in the country, which could make it seem that he was still waging his war against the press.[309] Nixon also had a long rivalry with Earl Warren. Warren became infuriated with Nixon during the 1952 Republican Convention, when Nixon promised to support Warren for President but instead supported Eisenhower—a contempt that was almost a "visceral repugnance," according to Warren biographer Bernard Schwartz.[310] On the other hand, Nixon was excited by the intellectual challenge of the argument and had personal sympathy for the Hills. Eventually, Nixon took on the case, realizing the potentially significant consequences for the law and for his own future.[311]

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303 AITKEN, *supra* note 290, at 361–62.

304 *Id.* at 362.

305 GARMENT, *supra* note 5, at 70.

306 *Id.*

307 *Id.* at 82–85.

308 *Id.*at 83.

309 AITKEN, *supra* note at 290, at 313.

310 SCHWARTZ, SUPER CHIEF, *supra* note 5, at 337.

311 AITKEN, *supra* note at 290, at 313.

VI. *TIME, INC. V. HILL*

In the fall of 1965, Time, Inc. filed an appeal with the U.S. Supreme Court.[312] The constitutional question was

> [W]hether Sections 50 and 51 of the New York Civil Rights Law abridge the freedom of the press when they are construed to permit the award of damages for invasion of privacy by the publication of a review of a play that resembled a prior incident involving a private person, the review and accompanying photographs being inaccurate in some particulars.[313]

Time, Inc.'s lawyers sought to parallel the case to *Sullivan*, in which a minor and careless error in a publication on an important public issue resulted in a large and punitive judgment against a major publisher.[314]

> The question, then, is whether New York can properly impose . . . liability upon a publisher who connects without malice a non-public figure to a current news event in a report containing factual errors that could have been obviated by a more diligent investigation. The recital of that question suggests its inevitable answer under the First Amendment. To require the press to be totally accurate at its peril is precisely the kind of 'self-censorship' that was so roundly condemned in the *Times* opinion.[315]

"Like the citizen-critic, who has a duty to judge his government, the fourth estate has a duty to report the news. If that duty is encumbered by liabilities arising out of factual error or exaggeration, then it will not always be fully discharged, and the entire community suffers."[316]

Just as *Sullivan* subjected libel law to the First Amendment's purview, the Court should constitutionalize the tort of privacy, Medina argued. The "time ha[d] come for a decision making it clear that the First Amendment is present in what has traditionally been considered 'tort territory.'"[317] "As in the *Times* case, the occasion for a confrontation is at hand. . ."[318] On December 6, 1965, in a decision reported

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312 Under the law at the time, Time, Inc. had a statutory right of appeal. *See* 28 U.S.C. § 1257.

313 Jurisdictional Statement at 2–3, Time, Inc. v. Hill, 385 U.S. 374 (1967).

314 *Id.* at 8–9.

315 *Id.* at 20 (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 279 (1964)).

316 *Id.* (internal citation omitted).

317 *Id.* at 8 (quoting Marc A. Franklin, *A Constitutional Problem in Privacy Protection: Legal Inhibitions on Reporting of Fact*, 16 STAN. L. REV. 107, 139 (1963)). "For nearly seventy-five years there has been some murky understanding that freedom of expression is involved in the law of privacy, and yet to this day that body of law has still to be 'measured by standards that satisfy the First Amendment.'" Jurisdictional Statement at 12, Time, Inc. v. Hill, 385 U.S. 374 (1967).

318 Jurisdictional Statement at 9, Time, Inc. v. Hill, 385 U.S. 374 (1967). *See also High Court Takes a Suit on Privacy*, N.Y. TIMES, Dec. 7, 1965, at 35 (reporting on the Supreme Court's decision to review the *Hill* case). Justices Fortas, Warren, Stewart, and Clark voted not to

widely in the press, the Court announced that it would take the case to consider the "important constitutional questions of freedom of speech and press involved."[319]

A. Arguments

Against the backdrop of cultural concerns with privacy and free speech, and in the shadow of *Sullivan* and *Griswold*, the *Hill* case came to the Court freighted with a good deal of significance. From the time Cravath filed the appeal there was public interest in the case, enhanced by the presence of Nixon. The issues had personal meaning to several of the Justices, who had strong positions on the issues of privacy, free expression, and press privilege. The Justices were also aware of the case's legal importance. *Hill* raised doctrinal issues that were highly contested on the Court in 1965—the status of the constitutional right to privacy, the absolutism-balancing debate, and possible extensions of *New York Times v. Sullivan*.

Since *Sullivan*, the Court had been concerned with its implications and applications to different categories of plaintiffs and subject matter. As the *Times*' lawyer Herbert Wechsler had written presciently, "one could not fairly ask the Court . . . to foresee in one opinion all the problems that would evolve from this demarche in constitutional law."[320] It was unclear whether the privilege should extend beyond high-level public officials to lower-ranked officials, if it should apply to a broader class of "public figures," and perhaps even to all discourse on "public affairs."[321] *Sullivan* had announced a broad commitment to "the principle that debate on public issues should be uninhibited, robust, and wide-open."[322] The influential law professor Harry Kalven, Jr. suggested that such language implicitly invited the Court to extend the holding in a "dialectic progression from public

hear the case—a significant lineup, given the eventual outcome of the case. October Term 1966 History, William Brennan Papers, Library of Congress.

319 Time, Inc. v. Hill, 385 U.S. 374, 380 (1967).

320 LEWIS, *supra* note 5, at 183.

321 At the same time as the *Hill* case, the Court heard two cases involving the extension of the *Sullivan* principle in the libel context. In *Rosenblatt v. Baer*, the Court defined public officials as those who have "substantial responsibility for or control over the conduct of governmental affairs." 383 U.S. 75, 85 (1966). In 1967, the Court extended the *Sullivan* rule to "public figures" "involved in issues in which the public has a justified and important interest." Curtis Publ'g Co. v. Butts, 388 U.S. 130, 134 (1967).

322 New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

official[s] to government policy to public policy to matters in the public domain."[323]

1. *Time, Inc.*

In this vein, Medina's brief argued that the *Sullivan* reckless disregard standard should apply to speech on "matters of public concern" regardless of whether it involved public officials, public figures, or private citizens like the Hills. There should be "general constitutional protection [for] the press against damage awards" so long as the publication "makes some contribution to the dissemination of information or ideas, that is, to what is most broadly conceived to be news."[324] In effect, he was asking the court to constitutionalize a version of the newsworthiness privilege that had been recognized under the New York statute and as a matter of common law privacy doctrine.[325]

Medina invoked a "two-level theory" of the First Amendment, a kind of "definitional balancing" that had been suggested by the Court in cases involving various kinds of objectionable speech; among them, *Chaplinsky v. New Hampshire* (1942) (involving fighting words); *Beauharnais v. Illinois* (1952) (group libel), and *Roth v. United States* (1957) (obscenity).[326] These cases had implied that there were two categories of speech, protected speech that had "social value" and speech that was beneath First Amendment concerns. Advertising,

323 Kalven, Jr., *supra* note 229, at 221. A number of legal scholars had urged the Court to make precisely this move. *See, e.g.*, William O. Bertelsman, *Libel and Public Men*, 52 A.B.A J. 657, 661 (1966) (attempting to resolve the tension between free speech and the right to a good name by proposing "the legitimate public interest test," described as "the existence of a legitimate public interest in free discussion of the events from which the defamation arises"); Willard H. Pedrick, *Freedom of the Press and the Law of Libel: The Modern Revised Translation*, 49 CORNELL L.Q. 581, 589 (1964) (predicting that the Supreme Court would expand the announced First Amendment privilege beyond criticism of "official conduct of public officials"); Donald R. Adair, Note, *Free Speech and Defamation of Public Persons: The Expanding Doctrine of* New York Times Co. v. Sullivan, 52 CORNELL L. Q. 419, 419 (1966) (noting that the doctrine that the *Sullivan* court had developed proved to be relevant not only in cases concerning public officials, but in those involving candidates running for officials and private citizens as well).

324 Jurisdictional Statement at 14, Time, Inc. v. Hill, 385 U.S. 374 (1967) (citations omitted).

325 *Id.* at 10–11.

326 *Id.* at 14–15; *see* Roth v. United States, 354 U.S. 476, 485 (1957) (holding that obscenity is not afforded constitutional protection); Beauharnais v. Illinois, 343 U.S. 250, 256–57 (1952) (concluding that a statute making it a crime to distribute publications containing racist rhetoric did not violate the First and Fourteenth Amendments); Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942) (asserting that "words which by their very utterance inflict injury or tend to incite an immediate breach of the peace" are not constitutionally protected).

false words, incitements, and obscenity had been historically unprotected.[327] As the majority noted in *Chaplinsky*, "[t]here are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words . . . ."[328]

Life's article, describing a newsworthy matter of public concern, was protected speech, Medina argued. "In the present case, appellant reviewed a current newsworthy event which bore a substantial connection to a newsworthy event that had occurred some two and one-half years before. Such a publication, without more, is entitled to constitutional protection."[329] "As opposed to the libel and obscenity cases, we are here dealing with an expression regarding public facts that has substantial 'social value.'"[330] Negligent errors in otherwise newsworthy material did not cast speech into unprotected territory, he asserted. Medina asked the Court to prohibit liability under the New York statute for the publication of matters of public concern unless the plaintiff could demonstrate that the material was false and the error made with reckless disregard of the truth.[331]

2. Nixon

To Nixon, there was no free speech issue in the case.[332] Using the "two-level" theory, Nixon's brief argued that false speech and advertisements were outside the area of free speech, and so was the *Life* article.[333] "What overriding interest does the Constitution have in protecting false words, prepared in a commercial setting, when they cause serious injury to private persons who have done everything in their power to avoid exploitation and publicity?"[334] False and com-

327 *See* Emerson *supra* note 203, at 910, 937.

328 *Chaplinsky*, 315 U.S. at 572. In *Roth*, Brennan had written that "[a]ll ideas having even the slightest redeeming social importance . . . have the full protection of the [First Amendment's] guaranties, unless excludable because they encroach upon the limited area of more important interests." *Roth*, 354 U.S. at 484. Obscenity was outside this area. *Id.* at 484–85.

329 Brief for the Appellant at 25, Time, Inc. v. Hill, 385 U.S. 374 (1967).

330 *Id.* at 39.

331 Jurisdictional Statement at 23, Time, Inc. v. Hill, 385 U.S. 374 (1967) (requesting that the Court announce a federal rule providing that as long as what is being published has "social value," it would be afforded constitutional protection against criminal or tort liability for invasion of privacy).

332 Motion to Dismiss at 13, Time, Inc. v. Hill, 385 U.S. 374 (1967).

333 Brief for the Appellant at 39–40, Time, Inc. v. Hill, 385 U.S. 374 (1967).

334 Brief for the Appellee at 37, Time, Inc. v. Hill, 385 U.S. 374 (1967).

mercialized publications were not an "essential part of any exposition of ideas." "Our fundamental position is this: It is simply inconceivable that the law is powerless to protect an individual from harmful exploitation through deliberate lying."[335]

Sullivan had no relevance to *Hill*, he assured the Court. As Garment had observed in a memo to Nixon, "Cravath is making a strained effort to fit this into the facts of New York Times." "The obvious distinction between New York Times and this case is that the former involved statements concerning a public official."[336] Part of *Sullivan*'s rationale had been that officials "waived" their reputational rights when they entered the political arena.[337] Public officials could also defend themselves without the aid of the law; their visibility and status gave them a platform from which to rebut injurious statements.[338] The Hills had no such means of self-defense. "1. Public man has some power to rectify the wrong *sans* legal remedy. 2. Private man is helpless," Nixon jotted in a note to himself.[339]

Garment was confident that the Court would reject Medina's efforts to extend *Sullivan*. "If the Court accepts Cravath's argument and equates the *Life* article with the *New York Times* advertisement it will have made an enormous extension in *New York Times* doctrine," Garment wrote to Nixon.[340] Even if *Sullivan* were to apply, the Hills' lawyers argued to the Court, the actual malice standard had been satisfied. *Life*'s editors had been shown at trial to have been "indifferent to [] the falsity of the connection" between the Hills and the *Desperate Hours*.[341] Reckless disregard of the truth was "implicit" in a finding of intentional falsification.[342]

While Medina tried to align *Hill* with *Sullivan*, Nixon cast *Hill* in the image of *Griswold*. *Time, Inc. v. Hill*, like *Griswold*, was a case about the disappearance of privacy in America and much-needed legal protections for the "right to be let alone."[343] Drawing on academic and

335 Memorandum, undated, Wilderness Years Collection, Series VI, Legal Papers, Time, Inc. v. Hill (on file with the Nixon Presidential Library).

336 Memorandum from Garment to Nixon, Wilderness Years Collection, Series VI, Legal Papers, Time, Inc. v. Hill (Oct. 1, 1966) (on file with the Nixon Presidential Library).

337 New York Times Co. v. Sullivan, 376 U.S. 254, 273 (1964) (judges and other officials were "'men of fortitude, able to thrive in a hardy climate'" (citations omitted)).

338 *Id.*

339 Note, undated, Wilderness Years Collection, Series VI, Legal Papers, Time, Inc. v. Hill (on file with the Nixon Presidential Library).

340 Memorandum from Garment to Nixon, Wilderness Years Collection, Series VI, Legal Papers, Time, Inc. v. Hill (Oct. 1, 1966) (on file with the Nixon Presidential Library).

341 Brief for the Appellee at 4, Time, Inc. v. Hill, 385 U.S. 374 (1967).

342 *Id.* at 35.

343 *Id.* at 20–22.

theoretical works on privacy, as well as contemporary, popular writings such as the bestselling book *The Naked Society*, the Nixon brief was an emotional paean to the importance of privacy to individual autonomy, dignity, and selfhood. "The right to privacy is fundamental to our constitutional system. Like the freedom to speak and write and print, it is vital to the growth of the individual and the enrichment of society."[344] "Whether a particular privacy has specific protection, as in the Fourth and Fifth Amendments, or has other more general protection under the Constitution, [as in *Griswold v. Connecticut*], it derives meaning from the unifying concept of 'the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty.'"[345] "The law of privacy affirms a conviction that, even in a society increasingly characterized by powerful and impersonal organizations of government and commerce, the personality of the individual is worth protecting."[346]

Extending *Griswold*, Nixon asserted that the right to privacy not only shielded people from intrusions by the state, but also from private actors like the press. "The Constitution, by definition and implication, recognizes protected privacies and secures them from governmental intrusions. No less central to our constitutional plan is the power and responsibility of the individual states to protect their citizens from unreasonable intrusions and injury at the hands of individuals."[347] Nixon argued that *Griswold* had implicitly raised the tort right to privacy to constitutional stature. *Griswold* was "valid precedent for [*Hill*] because it recognizes that the Bill of Rights protects the privacy of an individual."[348]

B. Yellow Notepads

In the weeks before the oral argument in April 1966, Nixon prepared obsessively for his performance. Associates at the firm prepared memo upon memo for Nixon to digest and lists of reading on privacy and free speech, including writings by Meiklejohn and other legal scholars, published talks by Justice Brennan on the First Amendment, popular literature on privacy, and dozens of privacy cases under the New York statute. He memorized the trial record, relevant precedents, and dozens of law review articles. As the oral ar-

344 *Id.* at 21.
345 *Id.* at 22 (citations omitted).
346 *Id.* at 33.
347 *Id.* at 20.
348 *Id.* at 21–22.

gument neared, he set up "skull sessions," question and answer sessions with his colleagues simulating court argument.[349] As Nixon recalled, "I locked myself up in my office for two weeks. No phone calls. No interruptions. It [took] a tremendous amount of concentration."[350] Nixon was driven to give the best possible performance in his return to the public stage; whether or not he admitted it, he was also enacting his vendetta against the press.

Throughout his career Nixon was notorious for his scribbling on long, lined yellow legal notepads. Nixon's "closest friend was the always available, always compliant, always silent yellow pad," Garment recalled. "It . . . served as a kind of door through which he could walk and shut out the world. When Nixon took out his yellow pad and unscrewed his pen, you knew it was time to move on."[351] Nixon's presidential archives contain literally hundreds of yellow pages with his notes on the *Hill* case, in his scrawling, cramped hand. As he wrote on March 14, 1966, commenting on Cravath's "weak points": "1) They equate Hills with public figures! 2) Attempt to extend Sullivan—no reasoning. 3) fiction by definition is deliberate untruth."[352] He developed an arsenal of provocative attacks on *Life* that he planned to deliver at oral argument. "I like my magazine newsy, exciting, and stimulating, but not at the cost of invading privacy of a just ordinary middle class family by using their name in a fictional setting for commercial gain."[353] "With Hills they threw caution to the winds to get maximum impact for benefit of magazine and collateral event—the show."[354] He described *Life*'s technique of fabricating news as "hoaxing."[355] "Such hoaxing neither educates nor informs, and therefore does not present a First Amendment problem," he wrote.[356]

Memos circulated in the office before the oral argument scrutinized the Justices' personalities and predicted their votes.[357] Chief

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349 Garment, *The Hill Case*, *supra* note 5, at 94.

350 Fred Graham, Time, Inc. v. Hill, *in* A GOOD QUARREL: AMERICA'S TOP LEGAL REPORTERS SHARE STORIES FROM INSIDE THE SUPREME COURT 171 (Timothy Johnson & Jerry Goldman, eds., 2009).

351 GARMENT, *supra* note 5, at 111.

352 Memorandum, Wilderness Years Collection, Series VI, Legal Papers, Time, Inc. v. Hill (Mar. 14, 1966) (on file with the Nixon Presidential Library) (hereinafter Memorandum, Mar. 14, 1966)

353 *Id.*

354 *Id.*

355 *Id.*

356 *Id.*

357 On the Warren Court, see generally MICHAL BELKNAP, THE SUPREME COURT UNDER JUSTICE EARL WARREN, 1953–1969 (2005); POWE JR., *supra* note 230; BERNARD SCHWARTZ,

Justice Warren, a former two-term governor of California, was not an intellectual, but he was a skilled politician whose talent was his ability to create harmony within small groups. His jurisprudence, emphasizing individual rights and liberties, was practical and human-driven; Warren tended to place personal sympathies and equitable considerations over legal formalities.[358]

In his eighties, Hugo Black was, according to one Court historian, "on the downslide," becoming increasingly acerbic and more tenaciously committed to his unique jurisprudence.[359] William Douglas, who constituted the liberal wing of the Court with Warren and Brennan, had always been iconoclastic and eccentric; Douglas perceived himself as a rebel and a loner and derived great satisfaction from writing provocative solo dissents.[360] More than any other member of the Court, Douglas was a results-oriented justice who seemed to care little about formal doctrine and explaining the reasoning for his positions.[361]

The conservative John Marshall Harlan remained committed to his position of legislative deference and a "jurisprudence that could explain only incremental change."[362] Harlan was often joined ideologically with Tom Clark, a former attorney general who had been appointed by President Truman. Byron White and Potter Stewart were moderates, known for their practical, nondoctrinal approaches.[363] White and Stewart were also swing votes who made unpredictable alliances.[364] Abe Fortas, former high-profile Washington attorney, lawyer for Lyndon Johnson, and counsel for the defendant in *Gideon v. Wainwright*, had been appointed to the Court in 1965 to replace Arthur Goldberg.[365] Fortas, who joined the liberal wing, established himself as a judicial pragmatist; even more than Douglas, Fortas "had

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THE WARREN COURT: A RETROSPECTIVE (1996); MARK TUSHNET, THE WARREN COURT IN HISTORICAL AND POLITICAL PERSPECTIVE (1993).

358 LUCAS A. POWE, THE WARREN COURT AND AMERICAN POLITICS 303 (2009). On Warren, see generally JIM NEWTON, JUSTICE FOR ALL: EARL WARREN AND THE NATION HE MADE (2006); ED CRAY, CHIEF JUSTICE: A BIOGRAPHY OF EARL WARREN (1997); G. EDWARD WHITE, EARL WARREN: A PUBLIC LIFE (1982).

359 POWE JR., *supra* note 230, at 303. On Black, see generally HOWARD BALL, HUGO L. BLACK: COLD STEEL WARRIOR (1996); ROGER K. NEWMAN, HUGO BLACK, A BIOGRAPHY (1994); TINSLEY E. YARBROUGH, MR. JUSTICE BLACK AND HIS CRITICS (1988).

360 On Douglas, see generally BRUCE ALLEN MURPHY, WILD BILL: THE LEGEND AND LIFE OF WILLIAM O. DOUGLAS (2003); WILLIAM O. DOUGLAS, THE COURT YEARS (1980).

361 HALL & UROFSKY, *supra* note 122, at 141.

362 POWE JR., *supra* note 2300, at 304.

363 LEVINE & WERMIEL, *supra* note 5, at 10–11.

364 *Id.* at 10.

365 LAURA KALMAN, ABE FORTAS: A BIOGRAPHY 244–45 (1990).

contempt for the explanatory process . . . . [O]nce he knew his desired outcome, he couldn't care less how he got there," writes historian Lucas Powe.[366]

A memo predicted that Warren would support the Hills' position. "Warren has taken a strong position in defense of the rights of an individual criminal accused or arrestee who is often helpless to defend himself against the collective power of society; in *Hill* he may be . . . predisposed to protect an individual injured by a more powerful social force."[367] Black and Douglas would obviously go for Time, Inc. Harlan, Clark, White, and Stewart were wild cards. Harlan generally sided with the instrumentalities of government, but Harlan and Stewart had voted against the majority's recent decision in *Ginzberg v. U.S.* to convict the publisher of an obscene magazine, suggesting they might side with the press.[368] However, Stewart had also voiced concerns about extending *Sullivan* to plaintiffs who were not public officials.[369]

Brennan "has recently emerged as the most important First Amendment spokesman on the Court," the memo observed.[370] The brief was "addressed to Brennan more than any other member of the Court."[371] Fortas was perhaps "the least predictable justice on First Amendment questions."[372] Fortas was part of the liberal bloc, but he had also decided against civil liberties, voting with the majority in *Ginzberg*.[373] The memo concluded: "Fortas' work in *Gideon*, however, may predispose him, like Warren, to give greater weight than Brennan" to the interests of sympathetic figures like the Hills.[374]

C. April 27, 1966

On April 27, 1966, Nixon and Medina arrived at the Court for oral argument. The tension in the courtroom, packed with press correspondents, was palpable. "Staring up at his old rival [Warren], re-

366 POWE JR., *supra* note 230, at 304. On Fortas, see generally KALMAN, *supra* note 365; BRUCE ALLEN MURPHY, FORTAS: THE RISE AND RUIN OF A SUPREME COURT JUSTICE (1988).

367 *See* Memorandum, Mar. 14, 1966, *supra* note 352.

368 *See generally* Ginzburg v. United States, 383 U.S. 463, 493 (1966) (Harlan J., dissenting); *id.* at 497 (Stewart J., dissenting).

369 Rosenblatt v. Baer, 383 U.S. 75, 92–93 (1966) (Stewart J., concurring).

370 *See* Memorandum, Mar. 14, 1966, *supra* note 352.

371 On Brennan, see generally SETH STERN & STEPHEN WERMIEL, JUSTICE BRENNAN: LIBERAL CHAMPION (2010); W. WAT HOPKINS, MR. JUSTICE BRENNAN AND FREEDOM OF EXPRESSION (1991).

372 *See* Memorandum, Mar. 14, 1966, *supra* note 352.

373 Fred Rodell, *The Complexities of Mr. Justice Fortas*, N.Y. TIMES, July 28, 1968.

374 *See* Memorandum, Mar. 14, 1966, *supra* note 352.

flecting on the indignities each had served on the other over the years, Nixon had to blanch at how thoroughly Warren once again controlled his destiny," writes a Warren biographer.[375] But Nixon came to Washington on a high tide of confidence, fueled by the good wishes of many supporters, including James Hill, who sent Nixon a handwritten note a week before the argument.

> Dear Dick, Just wanted you to know that we are glad you are with us in the final round of our fight. If we don't lick them next week in Washington I'll be glad to barnstorm the country with you to see if public opinion can't do what proper legal channels should have taken care of years ago. Am sure this won't be necessary. Will be in Washington next week pushing with you."[376]

Medina spoke first.[377] He reiterated that *Life*'s falsity was incidental and negligent; the "difference between saying strikingly similar and inspired [or] reenacted is so small that we shouldn't be charged $30,000 for it and we shouldn't be worrying about it."[378] He pressed on the application of *Sullivan*, asserting that the jury instruction was constitutionally flawed because it did not require the Hills to prove that the falsity of *Life*'s statement had been made with reckless disregard of the truth.[379]

Medina also raised concerns with a concurring opinion in the state appeals court's decision. Judge Benjamin Rabin of the Appellate Division had suggested that a newsworthy article, if presented solely for the purpose of "increasing circulation," could be subject to liability under the New York statute as a "trade" or "commercial" publication.[380] Under this reading, a newspaper could be liable for publishing material in order to attract readers; if this were true, the statute was not only absurd but unconstitutional.[381] Medina's introduction of the "Rabin dictum" into the dialogue added a new twist to the case, and as it turned out, shifted its course.

Nixon insisted that the *Life* publication was intentionally falsified and that there was no constitutional rationale for protecting it. Regardless of whether the jury had been explicitly instructed on it, he argued, *Life*'s reckless disregard of the truth was made manifest at tri-

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375 NEWTON, *supra* note 358, at 474.

376 Letter from James Hill to Nixon, Wilderness Years Collection, Series VI, Legal Papers, Time, Inc. v. Hill (Apr. 19, 1966) (on file with the Nixon Presidential Library).

377 Oral Argument, Time, Inc. v. Hill, 385 U.S. 374 (1967) (No. 22), https://www.oyez.org/cases/1965/22.

378 *Id.*

379 *Id.*

380 *Id.*

381 *Id.*

al.[382] Nixon challenged Medina's reading of the New York statute, arguing that only false and fictionalized works were actionable under New York law—true, newsworthy material had never been penalized—and that Rabin's statement, a throwaway line in a concurrence, was nonbinding as law.[383]

"Dressed somberly in a black suit and starched collar"[384] and "appearing as comfortable in his role as a lawyer as he did in politics,"[385] according to the press, Nixon delivered an argument that was skilled and workmanlike. *New York Times* journalist Fred Graham, who was there that day, recalled that Nixon's argument was devoid of the "self-important posturing" that was so often present when other political figures argued before the Court.[386] "Nixon . . . was at times candid to a fault," Graham noted. Worried that he might play into the cunning, "Tricky Dick" image of his political days, Nixon responded to the Justices' questioning with a candor that "at times seemed to concede more than necessary."[387] Nixon's argument was filled with dramatic lines he had written out carefully on his yellow pads and committed to memory. *Life* was "completely unconcerned about the Hills, knew nothing about them, and made no effort to find out what actually had happened during the incident," he told the Court." They were using these people as props . . . for the purpose of making the article more readable and for selling more magazines."[388] "Life lied and it knew it lied" was a favorite phrase.[389] He reminded the Court of the importance of the case: privacy was "an area of the law which deserves a paramount measure of protection because . . . it's an area where you have the fundamental problem that confronts all Americans today . . . how does an individual remain an individual in our mass communication society?"[390]

Warren voiced hostility towards the press and Medina but gave no hint of his enmity towards Nixon.[391] Fortas at times pressed hard,

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382 *Id.*

383 *Id.*

384 *Nixon Defends Damage Award*, PHIL. INQUIRER, Apr. 28, 1966, at 5.

385 *High Court Hears Argument by Nixon, His First Before It*, N.Y. TIMES, Apr. 28, 1966, at 20.

386 Graham, *supra* note 350, at 173.

387 *Id.* at 175.

388 Oral Argument, Time, Inc. v. Hill, 385 U.S. 374 (No. 22) (1967), https:// www.oyez.org/cases/1965/22.

389 John P. MacKenzie, *Nixon Charges Life with Lie about Clients*, WASH. POST, Oct. 19, 1966, at A2.

390 Oral Argument, Time, Inc. v. Hill, 385 U.S. 374 (1967) (No. 22), https://www.oyez.org/cases/1965/22.

391 However, Warren "drew titters from the courtroom by catching Nixon off base on a point of California law." Graham, *supra* note 350, at 176. Nixon had tried to explain a Califor-

playing devil's advocate, but was generally supportive of Nixon's position.[392] Both Fortas and Warren were clearly thinking about privacy more broadly than the narrow terms of the New York statute. Did the press have a right to record a married couple in their bedroom and broadcast the recording if it was newsworthy? Could the press dredge up long-hidden facts about a person and publish them if they there was public interest in them?

Black was outspokenly against Nixon. Why wouldn't the New York statute potentially cover "every news item . . . or every editorial"? he asked. "Doesn't any publication made about a human being affect his privacy?"[393] The statements by Warren and Fortas were surprising to Nixon, given how much both men opposed Nixon's politics. Nixon later commented that because Warren and Fortas had both been in the public eye before coming to the Court, they "knew firsthand how fierce and lacerating the press could be when it fastened on a target."[394] At a Court luncheon shortly after the argument, the Justices expressed surprise that Nixon had done so well.[395] Fortas believed that Nixon had made one of the best arguments that he had heard on the Court and that Nixon could develop into one of the "great advocates of our times."[396]

The next morning Garment found on his desk a five page, single-spaced memorandum addressed to him from Nixon. Upon arriving at his Fifth Avenue apartment after the oral argument, Nixon had dictated a tape of commentary, transcribed by Nixon's secretary. "Now that the case is over, here are some of the points I believe deserved more emphasis in the oral argument," read the memo." I only wish there were some way we could ethically transmit some of these thoughts to the clerks who will be helping the justices write their briefs!"[397]

Exhibiting a trademark, self-deprecating streak, Nixon criticized his performance. He believed that he should have stressed the brutality and "ugly incidents" in the *Desperate Hours*, which would have

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nia court decision by declaring that it was a common law decision—Warren informed him that there was no common law jurisdiction in California. *Id.*

392 *Id.*

393 Oral Argument, Time, Inc. v. Hill, 385 U.S. 374 (1967), https://www.oyez.org/cases/1965/22.

394 Garment, *supra* note 5, at 90, 97.

395 *Id.* at 97.

396 *Id. But see* SCHWARTZ, SUPER CHIEF, *supra* note 5, at 643 (claiming that Fortas deemed Nixon's performance "mediocre")

397 Memorandum from Richard Nixon to Leonard Garment (Apr. 28, 1966) (on file with the Nixon Presidential Library).

brought home the seriousness of the offense to the Hills.[398] Nixon also acknowledged the weakness of his privacy argument. He admitted that *Griswold* was not really on point, since the state was not infringing on the Hills' privacy; "here the question is not the power of the state to infringe on a right but the power of the state to recognize and implement a right."[399] He thought it might have been wise to 'downgrade' the Hills' right to privacy from a freestanding constitutional right to "one of those areas where the state had the power under the Ninth and Tenth Amendments to give redress to private citizens where they are injured by other private citizens."[400] This would offer privacy greater protection than leaving it to rest on the shaky foundations of *Griswold*.[401]

A good portion of the memo is devoted to his concerns about media publicity. Nixon claimed that "there were no columnists or nationally known reporters present" at the oral argument, although it did in fact receive quite a bit of press coverage. The press comments on Nixon's performance were overwhelmingly positive; the *Washington Post*'s Supreme Court reporter described Nixon's performance as "one of the better oral arguments of the year."[402] But there wasn't as much publicity as Nixon wanted, and he wondered whether the poor coverage was an indication of an attempted "blackout" by the "press establishment." Oddly, he feared that Time, Inc. had talked to the *New York Times*, the top officials of the Associated Press, and "even the *Newsweek* crowd" and "warned them of the consequences of giving any significant publicity to our presentation." He admitted that the lack of publicity had no effect on whether they won the case, or whether the law firm won more clients, but it did have an effect on his political plans—as he put it, "in terms of other considerations which are broader than our purely 'commercial' interests."[403]

He thanked Garment for letting him argue *Time, Inc. v. Hill*. "Your stepping aside when you yourself could have handled the mat-

398 *Id.*

399 *Id.*

400 *Id.*

401 *Id.*

402 *Id.*; *see Nixon Argues His First Case in Supreme Court*, L.A. TIMES, Apr. 28, 1966, at 7 (describing Nixon as "a smooth and deferential advocate"); *Nixon Holds Center Stage in High Court Debut*, MIAMI HERALD, Apr. 28, 1966; *High Court Hears Argument by Nixon, His First Before It*, N.Y. TIMES, Apr. 28, 1966, at 20 (noting that Nixon appeared "as comfortable in the role of the Wall Street lawyer as he did in public life"); Ronald Ostrow, *High Court Backs Press in False Report Cases*, L.A. TIMES, Jan. 10, 1967, at 7 (noting that Nixon was "making his first appearance before the high court").

403 Memorandum from Richard Nixon to Leonard Garment, *supra* note 397.

ter in brilliant fashion demonstrated a selflessness which is very rare in our firm or any other firm for that matter," he wrote. "I only hope that you will get some much deserved 'dividends' in the future!"[404] After he was elected President, Nixon appointed Garment to the White House staff as a special consultant to the President.[405]

VII. DECISIONS

Two days after the oral argument the Court met in its private conference, the session where the Justices discussed the cases heard that week and voted on the outcome. The conference is secret, and the record of the meeting in *Time, Inc. v. Hill* comes from a handwritten memo by William Douglas, held in his personal papers.[406] The lines of fracture in the *Hill* case were clear going into the conference. The primary disputes revolved around First Amendment absolutism and balancing, the extension of *Sullivan*, and the reach and scope of *Griswold*'s right to privacy.

A. The First Conference

Chief Justice Warren, speaking first, voted to affirm the New York Court of Appeals. The *Life* article was not "news," he said. "It is a fictionalization of an incident that was false in a material respect and can constitutionally be actionable."[407] Warren had long been concerned with the excesses of the press, and the *Hill* case offered him a venue to express his grievances with the media.[408]

Justices Clark, Fortas, Stewart, and Harlan agreed with Warren.[409] In a position he would later come to regret, Brennan also joined the majority, convinced that *Sullivan* was not relevant to *Hill*. "Times could be distinguished on a multifactor approach," Brennan wrote in a handwritten memo.[410] The *Hill* case involved a "1) non-governmental . . . issue; 2) not a daily reporting—no need for haste; 3) Hill did not thrust himself into [publicity][;] 4). . .[Life] had

404 *Id.*

405 *See generally Leonard Garment*, NIXON PRESIDENTIAL LIBRARY & MUSEUM, http://www.nixonlibrary.gov/forresearchers/find/textual/central/smof/garment.php (providing a chronology of Garment's White House positions).

406 Douglas was known for keeping detailed records of conference proceedings and votes. *See* HALL & UROFSKY, supra note 122, at 162.

407 Notes on Conference, Apr. 29, 1966, Box 1387, William O. Douglas Papers, Library of Congress.

408 NEWTON, *supra* note 358, at 473–76.

409 *Id.*

410 Note, n.d., Box I: 141, William J. Brennan Papers, Library of Congress.

available sources . . . [and] had sources to check."[411] Black, not surprisingly, voted to reverse, claiming that a newspaper "can use fiction under the First Amendment." Douglas and White also voted to reverse.[412] The unanimity that had surrounded the *Sullivan* decision was unraveling in the face of the very different facts of the *Hill* case.[413]

Warren assigned the opinion to Fortas, who proceeded to issue a scathing invective against Time, Inc. Fortas, who had essentially adopted Nixon's argument, circulated an initial—and as it turned out, ill-fated—version of his majority opinion on June 8, 1966.[414] "The facts of this case are unavoidably distressing," he began.

> Needless, heedless, wanton and deliberate injury of the sort inflicted by Life's picture story is not an essential instrument of responsible journalism. Magazine writers and editors are not by reason of their high office relieved of the common obligation to avoid deliberately inflicting wanton and unnecessary injury. The prerogatives of the press . . . do not preclude reasonable care and avoidance of casual infliction of injury to others totally unexplainable by any purpose or circumstance related to its function of reporting or discussing the news or publishing matters of interest to its readers. They do not confer a license for pointless assault. The injury to the Hill family illustrates the consequences of recklessness and irresponsibility in the use of mass media.[415]

Fortas conceded that important free speech issues were at stake. "This Nation is prepared to pay a heavy price for the immunity of the press in terms of national discomfort and danger in the tolerance of a measure of individual assault." But

> freedom of the press does not require that the state withhold its aid from persons threatened with misappropriation of their identity for purposes which have no relation to public information and which are nothing more than the knowingly false attribution of events to a named person for the purpose of accentuating the dramatic or entertainment value of a publication.[416]

Like Nixon's, Fortas's view of the case was structured around *Griswold*. Fortas described *Griswold* and the constitutional right to privacy

411 *Id.*

412 Notes on Conference, Apr. 29, 1966, Box 1387, William O. Douglas Papers, Library of Congress.

413 On the fracturing of the Court's consensus on libel in the aftermath of *Sullivan*, see generally LEVINE & WERMIEL, *supra* note 5.

414 Fortas draft opinion, Time, Inc. v. Hill, June 8, 1966, Box 545, Earl Warren Papers, Library of Congress.

415 *Id.*

416 *Id.*

in more sweeping terms than anyone on the Court had ever done.[417] Citing *Griswold*, as well as several other rulings on Fourth, Fifth, and First Amendment privacy, he wrote,

> There is . . . no doubt that a fundamental right of privacy exists, and that it is of constitutional stature. It is not just the right to a remedy against false accusation . . . it is not only the right to be secure in one's person, house, papers, and effects . . . it is more than the specific right to be secure against the Peeping Tom or the intrusion of electronic espionage devices and wire-tapping. All of these are aspects of the right to privacy, but privacy reaches beyond any of its specifics. It is, simply stated, the right to be let alone; to live one's life as one chooses, free from assault, intrusion, or invasion except as they can be justified by the clear needs of community living under a government of law.[418]

Fortas accepted Nixon's framing of privacy as an expansive right against invasions by both private and state actors. If "privacy is a basic right," whether one considers it derived from the First, Fourth, Fifth, or Ninth Amendments, or otherwise, "it follow[s] that the States may, by appropriate legislation and within proper bounds, enact laws to vindicate that right."[419] The Fortas position would have extended the constitutional protections for privacy not only to victims of false publicity like the Hills, but to people cruelly thrust before the public gaze in truthful publications, overriding the state law newsworthiness privilege in some contexts. Had the Fortas opinion come down as law, the right to privacy against the press, on par with Fourth Amendment privacies, would have been strengthened enormously. That did not come to pass.

Fortas agreed with Nixon that *Sullivan* was irrelevant to the case. The *Life* article "was not a retelling of a newsworthy incident or an event relating to a public figure."[420] "The deliberate, callous invasion of the Hills' right to be le[f]t alone—this appropriation of a family's right not to be molested or to have its name exploited and its quiet existence invaded—cannot be defended on the ground that it is within the purview of a constitutional guarantee designed to protect the free exchange of ideas and opinions," he wrote.[421] "Many . . . difficult problems may arise under the right-to-privacy statute, but we conclude that the present case, on its facts and on the New York law as

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417 *See* LAURA KALMAN, *supra* note 365, at 264–65 ("While *Griswold* had suggested that a right to privacy existed in limited circumstances, Fortas now described its existence in broader terms than any member of the Court had ever used.").

418 SCHWARTZ, SUPER CHIEF, *supra* note 5, at 243.

419 KALMAN, *supra* note 365, at 265.

420 Fortas draft opinion, Time, Inc. v. Hill, June 8, 1966, Box 545, Earl Warren Papers, Library of Congress.

421 *Id.*

construed by the courts of that state, does not permit the appellant to claim immunity from liability because of the First Amendment."[422]

Like Nixon, Fortas hated the press. According to his biographer Laura Kalman, Fortas "loathed and feared the press," due to his own unpleasant encounters with it, as well as those of his friend and benefactor, President Lyndon Johnson, who had appointed him to the bench.[423] During his time in private practice, in the McCarthy years, Fortas had represented many clients whose names were smeared in the press. By 1966, Fortas was actively seeking to narrow the scope of press freedom as set out in *Sullivan*. According to Kalman, Fortas "could not understand the insistence of justices Douglas and Black upon . . . First Amendment rights. Indeed, he regarded their protection of the media with the same bemusement with which another individual would have contemplated a defender of the rattlesnake's right to strike."[424]

The strongly worded Fortas opinion led to immediate reactions. Although Brennan joined the opinion, his penciled notes on his copy of the opinion make clear he thought Fortas had gone too far. He was unhappy with Fortas's use of the word "titillate" to describe *Life*'s motivation for the article and thought Fortas might have been "distorting the record" in his account of the facts.[425] According to a 1966 term history written by Brennan's clerks, Brennan felt that the Fortas opinion was "replete with invective for the press," and Brennan, who had championed the press in *Sullivan*, was offended. Fortas's opinion, his clerks wrote with alarm, "never once mentioned a First Amendment standard."[426]

Douglas issued a smug dissent. He agreed with Medina's newsworthiness theory and asserted that "state action abridges freedom of the press . . . where the discussion concerns matters in the public domain."[427] Referencing *Griswold*, Douglas wrote that "it would be one thing if the press were battering down barricades to the sanctuary of our home," but here there was no invasion of privacy.[428] "[A] private person is catapulted into the news by events over which he had no control. He and his activities are then in the public domain as fully as

422 *Id.*

423 *See* KALMAN, *supra* note 365, at 262.

424 *Id.*

425 *See* Notes on Fortas draft opinion in Box I: 141, William J. Brennan Papers, Library of Congress.

426 October Term 1966 History, William Brennan Papers, Library of Congress.

427 Douglas Draft Dissent, June 9, 1966, Box 545, Earl Warren Papers, Library of Congress.

428 *Id.*

the matters at issue in *New York Times Co. v. Sullivan*."[429] Black agreed with Douglas but not his reference to the hated *Griswold* opinion: "I would like to agree with you but do not want to suggest an association such as you do with *Griswold* . . . I hope you can take it out," he wrote to Douglas. Douglas agreed, and Black joined the dissent.[430]

White's dissent focused on the Rabin dictum; he was concerned with the possibility that truthful, "commercialized" material could be actionable under the New York law. He was also disturbed by the strict liability aspect of the statute. "Given these characteristics, the New York privacy law cannot be squared with the First Amendment," he wrote.[431] In response to White, Fortas circulated a draft with extensive revisions.[432] The Rabin concurrence was "not a correct statement of New York law," he argued, and the jury's finding of intentional falsification adequately demonstrated recklessness.[433]

Meanwhile, Black seethed over the Fortas opinion. He claimed that it was "the worst First Amendment opinion he had seen in a dozen years" and scribbled critiques on his copy of the opinion. In his handwritten notes, Black accused Fortas of having enacted a "court vendetta against Time," and claimed that the majority read into the record "every possible inference adverse to what the press has done." The Fortas opinion was "grossly exaggerated" to make Time, Inc. look like an "ogre" and a tyrant. Louis Brandeis, the architect of the tort right to privacy, "never ever intimated much less asserted that he was elevating a right to privacy to a constitutional plane on a level with the First Amendment." To give judges the "power to change the Constitution" as Fortas was doing was the hallmark of a "totalitarian regime."[434]

According to Fortas biographer Bruce Murphy, Black welcomed the bitter and sweeping Fortas opinion. Black harbored personal animosity towards Fortas, and the *Hill* draft "presented an opportunity to cut Fortas down to size."[435] Black planned to write a magnificent dissent, a treatise on First Amendment absolutism, but he needed

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429 *Id.*

430 Black to Douglas, June 9, 1966, Box 1387, William O. Douglas Papers, Library of Congress.

431 White Draft Dissent, Box 545, Earl Warren Papers, Library of Congress.

432 Note, Abe Fortas, June 14, 1966, Box 1387, William O. Douglas Papers, Library of Congress ("Attached is a new draft of my opinion in this case. The legal part of it has been completely rewritten and various changes have been made in the first portion of the opinion. I very much regret burdening all of you with this drastically revised opinion.").

433 Fortas draft opinion, June 14, 1966, Box 545, Earl Warren Papers, Library of Congress.

434 Fortas draft opinion, June 14, 1966, Box 296, Hugo Black Papers, Library of Congress.

435 MURPHY, *supra* note 366, at 231. *See also* GARMENT, *supra* note 5, at 93.

more time for his project. He thought that it would take him all summer to write his dissent, which would be the "greatest dissent of his life."[436] Black took advantage of Fortas's extensive revisions of the draft, and he wrote a note to Fortas in which he insisted that because of the alterations he needed extra time to write his response. The term was about to end; Black proposed that the case be held over to the following term so that he could properly address his concerns with the opinion.[437]

Black's entreaty, together with White's doubts about the statute, persuaded Fortas to agree to have the case held over to the next term and reargued. On June 16, 1966, Fortas issued an order requesting that Medina and Nixon return to the Court in the fall to address four questions:

> 1) Is the truthful presentation of a newsworthy item ever actionable under New York's statute as construed or on its face?; 2) Should the per curiam opinion of the New York Court of Appeals be read as adopting the (Rabin concurrence)?; 3) Does the concept of fictionalization require reckless disregard of truth or falsity as a condition of liability?; 4) What are the First Amendment ramifications of the respective answers to the above questions.[438]

Nixon, Garment, and the Mudge lawyers geared up for another round of questioning. Nixon interrupted his cross-country campaigning for Republican candidates in the 1966 midterm elections and devoted three weeks to focusing on the arguments.[439]

B. The Black Memorandum

Over the summer of 1966, Justice Black continued to fret over the *Hill* case. He remained troubled by the strident and accusatory Fortas opinion and the majority's efforts to constrain constitutionally protected speech through its "weighing and balancing" approach, in which it weighed the worth of Time, Inc.'s speech against the value of the Hills' privacy. He began to write a dissent that he planned to circulate to the Court right before the reargument. Throughout the summer months he worked diligently on this effort, often staying up until the wee hours of the morning. Black's wife was both impressed

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436 *Id.* at 94.

437 *Id.* at 106 (noting Black's concerns and desire to postpone a decision on the case); MURPHY, *supra* note 360, at 231.

438 Memorandum, Abe Fortas, June 16, 1966, Box 545, Earl Warren Papers, Library of Congress.

439 GARMENT, *supra* note 5 at 90.

and concerned by his devotion to the case. As she wrote in her diary on August 12, 1966:

> Hugo has been working until around 1:30 every night. He is working on this case he is so interested in. It's one that Abe Fortas got out about a week before the Court adjourned. Hugo told them he was going to write a dissent this summer, so they agreed to get it reargued this fall.[440]

An early draft from August 1966 reveals the tone of his writing; Black lamented the "exercise of this newly proclaimed power of judges to curb the American press" and condemned the majority's "gross, flagrant refusal to give Time, Inc. the benefit of the First Amendment."[441]

It was not only that Black was upset with Fortas's seeming disregard for the First Amendment and his expansive and textually ungrounded interpretation of constitutional privacy. Black disliked Fortas personally.[442] Fortas seemed to be reviving the ad hoc balancing that had been the hallmark of Felix Frankfurter, who had for many years been Black's main enemy on the Court.[443] Black believed that Fortas was using judicial power in "all the wrong directions" and was a purely "results-oriented" justice who had no regard for the Constitution. Fortas was a "wheeler dealer . . . totally unprincipled and intellectually dishonest," Black claimed.[444]

Fortas had come on strong in his first two years on the Court, with a "know-it-all attitude," and Black felt threatened by this. Black saw Fortas as a "pretender to the throne of leadership."[445] All of the Justices were openly disturbed by Fortas's ongoing connections to Lyndon Johnson, including offering advice to the President about Vietnam, domestic unrest, and other issues.[446] Shortly after Fortas joined the Court in 1965, Black began to attack him on several occasions, including outbursts towards him in Court sessions.[447]

The day before the reargument, on October 17, 1966, Black circulated his masterpiece. Supreme Court historian Bernard Schwartz characterized it as "more scathing in its condemnation of the weigh-

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440 HUGO BLACK & ELIZABETH BLACK, MR. JUSTICE AND MRS. BLACK: THE MEMOIRS OF HUGO L. BLACK AND ELIZABETH BLACK 151 (1988).

441 Draft, Aug. 1966, Box 296, Hugo Black Papers, Library of Congress.

442 MURPHY, *supra* note 360, at 219. On the Fortas-Black conflict, see NEWTON, *supra* note 358, at 475.

443 SCHWARTZ, SUPER CHIEF, *supra* note 5, at 217.

444 *Id.*

445 BALL, *supra* note 359, at 155; GARMENT, *supra* note 5, at 92.

446 BALL, *supra* note 359, at 154; Fred Graham, *The Many Sided Justice Fortas*, N.Y. TIMES, June 4, 1967, at SM14 (detailing Fortas's significant connections to President Johnson).

447 BALL, *supra* note 359, at 155.

ing process than anything else ever published by Justice Black."[448] "By legal legerdemain," the majority had transmuted "the First Amendment's promise of unequivocal press freedom . . . into a debased alloy," Black wrote.

> The weighing process makes it infinitely easier for judges to exercise their newly proclaimed power to curb the press. For under its aegis judges are no longer to be limited to their constitutional power to make binding *interpretations* of the Constitution. That power . . . has become too prosaic and unexciting. So the judiciary now confers upon the judiciary the more 'elastic' and exciting power to decide, under its value-weighing process, just how much freedom the courts will permit the press to have.[449]

"Weighing and balancing" was bad enough, but it was even worse when the value that was being weighed against the First Amendment was the amorphous, fictive "right to privacy." Black thought it "fantastic for judges to attempt to create . . . a general, all-embracing constitutional provision guaranteeing a general right to privacy." He mocked Fortas's tribute to privacy: "Neither the 'right to be let alone' nor the 'right to privacy,' while appealing phrases, were enshrined in our Constitution, as was the right to free speech, press, and religion." "If the judges have . . . by their own fiat today created a right of privacy equal to or superior to the right of a free press that the Constitution created, then tomorrow and the next day and the next the judges can create more rights that balance away other cherished Bill of Rights freedoms."[450]

Black attacked Fortas's "graphic and biting" characterizations of Time, Inc. Many of the "sharp criticisms and invectives" against Time, Inc. were "completely unsupported by the record," he asserted. The majority opinion represented the "greatest threat" to freedom of speech and press he had seen in his time on the Court. "One does not have to be a prophet, I think, to foresee that judgments like the one in this case can frighten and punish the press so much that publishers will cease trying to report news in a lively and readable fashion," Black concluded.[451] Shortly afterwards, Fortas went to Black's home, hurt and angered by what Black had written. According to Elizabeth Black, the two men talked it out and "Abe left feeling OK."[452]

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448 SCHWARTZ, UNPUBLISHED OPINIONS, *supra* note 5, at 299 (citations omitted).

449 Memorandum, Oct. 17, 1966, Box 545, Earl Warren Papers, Library of Congress.

450 *Id.*

451 *Id.*

452 BLACK & BLACK, *supra* note 440, at 153.

C. Reargument

When Nixon and Medina appeared before the Court on October 18, 1966, they were unaware of these bitter exchanges. Nixon was, in Garment's opinion, even better and more relaxed than he had been in the first argument.[453] The opposition to him, led by Black, White, and Brennan, was much fiercer, however. Garment and Nixon sensed that the Court's take had changed since the first argument—"and from our point of view . . . for the worse."[454] The reporter for the *Washington Post* noted that "while Nixon took a tougher line, Medina seemed to score more points with key Justices over involved questions of New York's invasion of privacy law."[455]

White and Brennan expressed doubts as to the statute's constitutionality. Over the summer, Brennan's unease with the Fortas position had grown into full-blown skepticism. By this time, Brennan was receptive to Medina's invitation to strike down the statute. The Rabin dictum, suggesting that newsworthy material could be penalized if published for profit, "bothered him more than anything else in this case," he said.[456] Black asked Medina whether he thought the *Sullivan* standard was "written for that case alone" or "should it fit all cases under the First Amendment." "I think it should fit all cases under the First Amendment and specifically the nondefamatory language we have used about a public fact," Medina replied. "Nondefamatory language of public facts deserves the same protection as certainly as . . . defamatory language about public officials if you are going to have free public discussion."[457]

Nixon pointed out that the Hills were not public figures, and that if the Court applied *Sullivan*, private figures would receive less protection for their privacy than for their reputations. Under the Court's libel doctrine at the time, the reckless disregard standard applied only to statements on public officials; the Court left intact the common law, strict liability rule for "private libels." Medina's proposal would create a discrepancy between libel and privacy law. Nixon challenged

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453 According to one of the Justices, Nixon, preoccupied with stumping for congressional candidates in the 1966 elections, was less focused on the argument this time around. SCHWARTZ, SUPER CHIEF, *supra* note 5, at 643.

454 Garment, *supra* note 5, at 100.

455 John P. Mackenzie, *Nixon Charges Life with 'Lie' About Clients*, WASH. POST, Oct. 19, 1966, at A2.

456 Transcript of Reargument, at 81, Time, Inc. v. Hill, 385 U.S. 374, 395 (1967), Oct. 18, 1966, contained in Leonard Garment Papers, Box 40, Folder 2, Library of Congress.

457 *Id.* at 92.

the Justices to explain why the interest in privacy was worth less than the interest in reputation.

Two days after the reargument, in the Court's second conference on the case, the votes had almost entirely switched. The initial vote had been six to three for the Hills; it now shifted to seven to two against the Hills. The overblown Fortas opinion, the Black memo, and doubts about the statute that had been confirmed at reargument had led to a reversal.[458]

Chief Justice Warren maintained his vote in favor of the Hills. He admitted that the New York law was "not too clear" but that the Court should put an end to the lengthy litigation.[459] In the statute's limited application to the *Life* story, which to him was a clear case of "fictionalization," there was no violation of the First Amendment.[460] False publications had no value as news.[461] Fortas held to his original position. Between the first and the second votes, Stewart, Harlan, Brennan and Clark had changed their minds.[462] With White, Douglas, and Black they would reverse for a new trial in which the jury would be instructed to apply the *Sullivan* rule to the falsity issue.[463]

Brennan and Black would have gone as far to strike down the statute.[464] This might have happened had the New York Court of Appeals not issued its decision, a week later, in *Spahn v. Julian Messner, Inc.*, in which it confirmed Nixon's reading of the privacy statute—truthful, newsworthy material was privileged even if published for "circulation-generating" purposes.[465] The Rabin dictum was not a correct statement of the law.[466] The decision in *Spahn* led Brennan to believe that the statute need not be struck down on its face—New

458 Bernard Schwartz attributed the switch in the votes to the Black memo. My research suggests that Black's writing was clearly a factor, but it does not account entirely for the change in positions. By the end of the summer, most of the justices were already leaning towards Time, Inc.'s position. SCHWARTZ, SUPER CHIEF, *supra* note 5, at 301.

459 Notes on Conference, Oct. 21, 1966, Box 1837, William O. Douglas Papers, Library of Congress.

460 *Id.*

461 *Id.*

462 *Id.*

463 *Id.*

464 *Id.*

465 *Spahn* involved the famous baseball player Warren Spahn, who sought an injunction and damages against the unauthorized publication of what purported to be a biography of his life. The Court of Appeals sustained the trial court's holding that the book consisted primarily of factual errors and was actionable. Spahn v. Julian Messner, Inc., 221 N.E.2d 543 (N.Y. 1966).

466 *Spahn* also made clear that there was no intent requirement under the New York statute. The Court of Appeals in *Spahn* had been invited to apply *Sullivan* and refused. *Spahn*, 221 N.E.2d at 545.

York law respected newsworthy material– but that a new trial was needed so the law could be constitutionally applied with a scienter requirement.[467]

With the Chief Justice no longer in the majority, Black, as the senior majority justice, assigned the opinion, and he gave it to Brennan.[468] "Hugo told me he had assigned five cases Friday. He evidently got the Court on his *Time* magazine case!" Black's wife noted in her diary on Saturday, October 23, 1966, "How he has worked. Abe and the Chief only ones against him."[469]

Brennan issued the first draft of his opinion on December 1, 1966. At first, White was the only one to join the opinion.[470] Three weeks passed; finally, on December 22, Fortas circulated a dissent. Aware of how much he had offended Brennan with his first opinion, he sought to make amends. Fortas sent a copy of his dissent to Brennan with a handwritten note: "Please let me know if any of this bark is too bitey. I'll change it."[471] Warren joined the dissent, and so did Clark, who had inexplicably retreated from the majority.

Harlan circulated an opinion concurring in the judgment but on a negligence standard.[472] Black and Douglas both circulated opinions joining Brennan's opinion but made clear that they were still committed to their absolutism. Stewart then became the deciding vote. Brennan lobbied him, and he agreed to reverse. Brennan had won Stewart's allegiance by adding a paragraph clarifying that the holding would apply only to privacy cases, not libel cases involving private persons, which had been a particular concern of Stewart's. Stewart wrote to Brennan the day after he made this change, agreeing to join Brennan's opinion.[473]

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467 Time, Inc. v. Hill, 385 U.S. 374, 381–88 (1967).

468 On Brennan's ability to put together majorities, see HALL & UROFSKY, *supra* note 122, at 166; LEVINE & WERMEIL, *supra* note 5, at 20–31; KIM ISAAC EISLER, A JUSTICE FOR ALL: WILLIAM J. BRENNAN JR. AND THE DECISIONS THAT TRANSFORMED AMERICA 188–89 (1993) ("Brennan was a politician, an operator who conceived of his role in a completely different fashion from that of most judges. He worked the justices the way Lyndon Johnson worked the floor of the Senate.").

469 BLACK & BLACK, *supra* note 440, at 153.

470 Immediately after the opinion was circulated, White wrote to Brennan saying that he had "a good deal of enthusiasm for the job you have done." Byron White Papers, Box 94, Library of Congress.

471 Fortas to Brennan, Dec. 22, 1966, Box 141, William Brennan Papers, Library of Congress.

472 Harlan Concurrence, Jan. 9, 1967, Box 141, William Brennan Papers, Library of Congress.

473 Letter from Potter Stewart to William Brennan (Jan. 5, 1967) (on file with author) ("I think you have written a fine opinion, and I am glad to join it.").

D. January 9, 1967

The 5-4 decision in *Time, Inc. v. Hill* was issued on January 9, 1967.[474] "We hold that the constitutional protections for speech and press preclude the application of the New York statute to redress false reports of matters of public interest in the absence of proof that the defendant published the report with knowledge of its falsity or in reckless disregard of the truth," the majority concluded.[475] The trial judge's charge to the jury had failed to indicate that reckless falsehood was a prerequisite to liability.[476] The Court remanded the case to the New York Court of Appeals for a new trial with a proper jury instruction.[477] Brennan took the law on false and defamatory statements about public officials and applied it to false and nondefamatory statements about private citizens connected to nonpolitical subjects.[478] This was a significant extension of *Sullivan* and, as Nixon had argued, not explained by its rationale of avoiding seditious libel and protecting the public's right to engage in political criticism.

In *Time, Inc. v. Hill*, Brennan extended the realm of First Amendment speech beyond what he had articulated in *Sullivan*. Brennan's vision of protected speech in *Hill* was as expansive as Meiklejohn's, perhaps even more so.[479] Time, Inc's brief on reargument had relied on Meiklejohn's ideas, and as the *Columbia Journalism Review* noted, there were "striking parallels in language between [Brennan's] opinion and Meiklejohn's writings."[480] In *Hill*, Brennan saw a chance to extend the First Amendment gains he had made in *New York Times*, and he took the opportunity to announce an expansive terrain of protected expression encompassing more than political affairs.

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474 Time, Inc. v. Hill, 385 U.S. 374, 374 (1967).

475 *Id.* at 387–88.

476 *Id.* at 394.

477 *Id.* at 398.

478 Brennan wrote that this was not a "blind" application of *Sullivan* but rather a parallel line of reasoning applying the standard to a discrete context—the "application of the New York statute in cases involving private individuals." *Id.* at 390.

479 "Time, Inc. v. Hill . . . indicate[s] that the Court has pretty much adopted Meikeljohn's delineation of the public and private spheres. The public sphere includes not only political issues . . . but also those collateral matters concerning which the citizens must be informed if they are to be 'educated for self-government.'" William O. Bertelsman, *The First Amendment and Protection of Reputation and Privacy*—New York Times Co. v. Sullivan *and How It Grew*, 56 KY. L.J. 718, 748 (1967) (quoting Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 263).

480 Donald L. Smith, *Privacy: The Right That Failed*, COLUM. J. REV. at 18, 21 (1969).

"The guarantees for speech and press are not the preserve of political expression or comment upon public affairs, essential as those are to healthy government," Brennan wrote.[481] He quoted a 1941 case, *Thornhill v. Alabama*: "Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period."[482] Brennan then referenced *Winters v. New York*, in which the Court had overturned the conviction of a bookseller under an "indecent exposure" statute for distributing a magazine containing "accounts of . . . bloodshed, lust or crime." "The line between the informing and entertaining [was] too elusive" to make that boundary the test for freedom of the press, the *Winters* Court had concluded.[483]

From this followed the *Hill* opinion's key passage: "We have no doubt that the subject of the *Life* article, the opening of a new play linked to an [ ] incident, is a matter of public interest."[484] Comic books, human-interest stories, gossip, and other less than enlightened material—the "vast range of published matter" that appeared in the press, however banal—were equally protected by the First Amendment.[485] Newsworthy material, as defined by the press, marked the ambit of free speech.[486] Brennan adopted the most expansive reading of the newsworthiness privilege under state privacy law, and went beyond it—even false, newsworthy material was protected unless the falsehood was "calculated."[487] Outside of the Black/Douglas absolutist position, which had never commanded a majority, Brennan's description of protected speech was one of the broadest in First Amendment history.[488]

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481 *Time, Inc.*, 385 U.S. at 388.

482 *Id.* at 389 (quoting Thornhill v. Alabama, 310 U.S. 88, 102 (1940)).

483 *Id.* (citing Winters v. New York, 333 U.S. 507, 508–10 (1948)); Winters v. New York, 333 U.S. 507, 508–10 (1948). The Winters majority went on to note that "[w]hat is one man's amusement teaches another's doctrine. Though we can see nothing of any possible value to society in these magazines, they are as much entitled to the protection of free speech as the best of literature." *Id.* at 510.

484 *Time, Inc.*, 385 U.S. at 388.

485 *Id.*

486 Harry Kalven, Jr., *The Reasonable Man and the First Amendment:* Hill, Butts, *and* Walker, 1967 SUP. CT. REV. 267, 281 (1967).

487 *Time, Inc.*, 385 U.S. at 390–91.

488 In Winters v. New York and Hannegan v. Esquire, the Court had made overtures to the kind of standard Brennan articulated in Hill—protection extended beyond strictly 'political' speech, that is, speech on public affairs—but did not say so explicitly. *See Winters*, 333 U.S. at 510 (suggesting that graphic magazines and other forms of "amusement" were fully protected by the First Amendment, even if they were offensive to much of the public); Hannegan v. Esquire, Inc., 327 U.S. 146, 158 (1946) (the First Amendment protected

Freedom of the press meant more than protecting political discourse and *Sullivan*'s "citizen critic."[489] Freedom of the press meant freeing the press from damage awards, with their chilling effect. The function of the press in a democratic society was to publish on all matters of public interest; too-easy liability for invasion of privacy impaired its ability to fulfill this duty.[490] "We create a grave risk of serious impairment of the indispensable service of a free press in a free society if we saddle the press with the impossible burden of verifying to a certainty the facts associated in news articles with a person's name, picture or portrait, particularly as related to nondefamatory matter," Brennan wrote.[491] "Erroneous statement" was no less inevitable in reporting stories like the *Life* article than in the case of "comment upon [political] affairs," and a negligence standard did not afford "the freedoms of expression . . . the 'breathing space that they need to survive."[492] Quoting to his own opinion in *Sullivan*, Brennan noted that "[f]ear of large verdicts in damage suits for innocent or merely negligent misstatement, even fear of the expense involved in their defense, must inevitably cause publishers to 'steer . . . wider of the unlawful zone.'"[493]

What about privacy? Brennan dismissed the *Griswold* argument by ignoring it. The only mention of privacy in the *Hill* opinion came in a passage that suggested that the Hills should have no expectation of privacy, at least when it came to media publicity: "Exposure of the self to others in varying degrees is a concomitant of life in a civilized community. The risk of this exposure is an essential incident of life in a society which places a primary value on freedom of speech and of press."[494] Although Brennan did not foreclose recovery for the Hills, he made clear that the Hills' non-constitutional privacy could not compete against freedom of the press. In *Hill*, privacy was not really being weighed against freedom of the press; Brennan was jettisoning privacy so the press could have freedom to exercise its social and constitutional functions.

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popular magazines like Esquire that may have seemed like "trash" to some readers) *see also* Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 532–33 (1952) (noting that movies and other forms of entertainment were encompassed by the First Amendment).

489 New York Times Co. v. Sullivan, 376 U.S. 254, 282 (1964).

490 *See* POWE JR., *supra* note 230, at 320 (noting that *Hill* was a "press case[] pure and simple, protecting an institution that was vital to the concept of democracy even when it was not discussing government affairs").

491 *Time, Inc.*, 385 U.S. at 389.

492 *Id.* at 388 (quoting *Sullivan*, 376 U.S. at 271–72).

493 *Id.* at 389 (quoting *Sullivan*, 376 U.S. at 279).

494 *Id.* at 388.

Time, Inc. v. Hill, like *Sullivan*, was a product of its time. By 1967, the cultural upheaval of the era had reached new levels of violence and acrimony. That year, 100,000 marched on the Pentagon to protest the Vietnam War. Race riots broke out throughout the country. Hippies and other countercultural activists experimented with radical, alternative lifestyles, spawning hateful reactions. The nightly news teemed with images of dissenters assaulted and beaten by authorities. A political and cultural transformation was underway, and the press played a critical role in it. This was not only through its reporting on political affairs. Publications like *Life* magazine, merging news and entertainment, kept the public abreast of the changes in politics, norms, habits, values and lifestyles that were unfolding as the nation hurtled deeper into the civil rights movement, the Vietnam War, and student dissent. As the Supreme Court correspondent for the *Washington Post* noted, *Hill* may well have been informed by the Court's "long-held interest in protecting [free] expression" for civil rights and other protest movements.[495]

In his concurrence, Black continued to propound his favorite themes, rejecting "*New York Times'* dilution of First Amendment rights" and attacking the "recently popularized weighing and balancing formula" as a "Constitution-ignoring-and-destroying technique."[496] "The 'weighing' doctrine plainly encourages and actually invites judges to choose for themselves between conflicting values, even where, as in the First Amendment, the Founders made a choice of values, one of which is a free press," he wrote.[497] "Though the Constitution requires that judges swear to obey and enforce it, it is not altogether strange that all judges are not always dead set against constitutional interpretations that expand their powers."[498] Douglas similarly expressed concerns about the "chilling effects" of anything less than absolute protection for speech.[499]

Harlan agreed to reverse but would apply a negligence standard on remand.[500] Like Fortas, he worried that actual malice did not go far enough to protect people like the Hills.[501] Public officials were a "hardy breed" who had assumed the risk of irresponsible publicity;

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495 Smith, *supra* note 480, at 21. The demise of the invasion of privacy tort, like the evisceration of libel in Sullivan, was perhaps "yet another unintended victim of the civil rights struggle." *Id.*

496 *Time, Inc.*, 385 U.S. at 399 (Black, J., dissenting).

497 *Id.*

498 *Id.*

499 *Id.* at 401 (internal quotation marks omitted).

500 *Id.* at 409–10 (Harlan, J., concurring).

501 *Id.* at 409.

private citizens had not.[502] While public officials could rebut false and injurious statements in the "marketplace of ideas," the Hills lacked access to a public platform and were helpless to defend themselves.[503] The "state interest in encouraging careful checking and preparation of published material" was much stronger than in *New York Times*.[504] "The majority would allow sanctions against such conduct only when it is morally culpable. I insist that it can also be reached when it creates a severe risk of irremediable harm to individuals involuntarily exposed to it and powerless to protect themselves against it."[505] Harlan concluded with a warning to the majority of the long-term consequences of extending *Sullivan*—in relieving the press of even "minimal responsibility" for accuracy, the *Times* doctrine was "ultimately harmful to the [ ] good health of the press itself. If the *New York Times* case has ushered in such a trend it will prove in its long-range impact to have done a disservice to the true values encompassed in the freedoms of speech and press."[506]

Fortas's dissent, joined by Warren and Clark, remained strident. "Perhaps the purpose of the [majority] decision [ ] is to indicate that this Court will place insuperable obstacles in the way of recovery by persons who are injured by reckless and heedless assaults provided they are in print, and even though they are [ ] divorced from fact," he wrote.[507] He chafed against Brennan's broad newsworthiness concept and maintained that the *Life* piece was not a "matter of [ ] public interest"; the publication "irresponsibly and injuriously invade[d] the privacy of a quiet family for no purpose except dramatic interest and commercial appeal."[508] Having no relevance to the functions of self-governance, the *Life* article was not part of the "specially protected core" of the First Amendment.[509] "I do not believe that the First Amendment precludes effective protection of the right of privacy—or for that matter, an effective law of libel. I do not believe that we must or should . . . strike down all state action . . . which penalizes the use of words as instruments of aggression and personal assault."[510]

Fortas denounced the *Griswold* Court for retrenching on the value of privacy. "The Court today does not repeat the ringing words of so

502 *Id.* at 408–09.
503 *Id.* at 409.
504 *Id.* at 408.
505 *Id.* at 410.
506 *Id.* at 410–11.
507 *Id.* at 411 (Fortas, J., dissenting).
508 *Id.* at 415.
509 *Id.* at 420.
510 *Id.* at 412.

many of its members on so many occasions in exaltation of the right of privacy. Instead, it reverses a decision under the New York 'Right of Privacy' statute" because of a minor technicality.[511] Fortas accused the majority of using the jury instruction as an excuse to adopt an absolutist position without coming out and saying so.[512] The "net effect" of the decision was not only an "individual injustice, but an encouragement to recklessness and careless readiness to ride roughshod over the interests of others."[513]

> For this Court totally to immunize the press . . . in areas far beyond the needs of news, comment on public persons and events, discussion of public issues and the like would be no service to freedom of the press, but an invitation to public hostility to that freedom . . . . This Court cannot and should not refuse to permit under state law the private citizen who is aggrieved by the type of assault which we have here and which is not within the specially protected core of the First Amendment to recover compensatory damages for recklessly inflicted invasion of his rights.[514]

Fortas expressed concerns about the well-being of the Hills, who had litigated the case for 11 years and were now about to be put through the burden of a new trial with no apparent justification.[515] That trial never came to pass. Shortly after the Court's decision, Time, Inc. settled with James Hill. The amount of the settlement was not a part of the public record; it appears in a memo that Garment wrote to Nixon and that has been preserved in Nixon's papers. "The Hill case is settled," Garment wrote to Nixon. "Time, Inc. has agreed to pay $75,000 (in addition to the $60,000 previously paid to settle Mrs. Hill's claim). Jim Hill is gratified with this outcome and relieved that another trial is avoided. Medina is likewise relieved. I think this is an honorable settlement, and, under the circumstances, a sensible step for all concerned."[516]

Even this could not compensate the Hills for their loss. In the aftermath of the *Life* article, Elizabeth Hill descended into mental illness.[517] She struggled with severe depression and self-destructive thoughts and for over a decade maintained a course of psychotherapy, medications, and electric shock treatments.[518] A few years after the Supreme Court's decision, Elizabeth Hill committed suicide.[519]

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511 *Id.* at 416.
512 *Id.* at 416–17.
513 *Id.* at 420.
514 *Id.*
515 *Id.* at 411.
516 Letter from Leonard Garment to Richard Nixon (May 18, 1967) (on file with author).
517 Garment, *supra* note 5, at 109.
518 *Id.*
519 *Id.*

VIII. AFTERMATH

Time, Inc. v. Hill had significant and enduring consequences. *Hill* constitutionalized the privacy tort, limiting liability for nondefamatory portrayals in the press. Brennan's majority opinion announced a sweeping vision of the First Amendment as protection for all newsworthy material. The press had an obligation to publish widely, on all "matters of public interest"—to inform and amuse, titillate and educate, and generate discourse on an array of issues and subjects, even if personal privacy was injured in the process.

Time, Inc. v. Hill was the first Supreme Court case to address the privacy-free press conflict, but it did not resolve it. It was the consensus of public opinion that the majority had not only gotten it wrong, but that it had given short shrift to an issue that deserved more attention and reasoned consideration. By refusing to engage with privacy and the *Griswold* argument, the Court angered many observers, and the decision deepened popular concerns with the disappearance of privacy. After *Griswold*, *Mapp v. Ohio*, and the Warren Court's many other privacy-protecting decisions, Americans had come to see the Warren Court as a defender of personal privacy against powerful and unjust social forces. *Hill* failed that expectation and left many feeling disappointed and betrayed.

Time, Inc. v. Hill represented a lost opportunity for the Court. For reasons we have seen, the Court missed the chance to seriously contemplate the rights of private persons against the press, whether and how ordinary people should be able to use the law to protect themselves against unwanted and injurious media publicity. The convoluted New York statute, which conditioned liability on commercialism and falsity, obscured the privacy issue in the case. Personal animus also colored the Court's deliberations—Black's dislike of Fortas, and Fortas's dislike of the press. The outcome in *Hill* was further complicated by the legal confusion around *Griswold* and Nixon and Fortas's perhaps unwise attempts to build their case on that disputed, shaky privacy right. The timing of the case most distorted it. Coming only a year after *Sullivan*, at a time when *Sullivan*'s implications concerned the Justices, it was not surprising that *Hill* would be cast in the shadow of *Sullivan* and that the Court would try to shoehorn its very different issues into the *New York Times* framework.

Harry Kalven, Jr. thought that the Court was "handicapped" by timing.[520] "*Hill* was a curiously difficult case to handle so soon after

520 Kalven, Jr., *supra* note 480, at 286.

New York Times," he wrote shortly after the decision.[521] Leonard Garment also believed that the case might have gone the other way if Time, Inc. had not appealed when it did. "Might the Hill decision have been affirmed if Time's appeal to the Supreme Court had not followed so quickly on the heels of Sullivan and the surrounding propress enthusiasm of the public and the courts?" he wrote in a 1989 *New Yorker* article.[522]

What might things have been like if the case reached the Court a few years later? What would have happened if Fortas had written his opinion in a more temperate tone? Might there have been a constitutional right against unwanted publicity? When would that right cede to the right of free speech? As Garment wrote in the *New Yorker*, the case left him with a "permanent collection of what-ifs."[523] Me too. What we do know is that things could have easily gone the other way, and that a constitutional right to privacy against the press, as Nixon and Fortas envisioned it, would have had no small impact on publishing, politics and public discourse.

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Like many of the Warren Court's civil liberties cases, *Time, Inc. v. Hill* was "enveloped by controversy."[524] The proceedings in the case had been watched avidly by the press and the public; in the days after the decision, almost all of the major media outlets reported on it, and some on the front page. "The Supreme Court ruled . . . that 'newsworthy' persons, including those who do not seek publicity, have only a limited right to sue for damages for false reports that are published about them," wrote the *Washington Post* the day after the decision.[525] The opinion substantially "extends the guarantee of freedom of the press established by the Constitution," noted the *Hartford Courant*.[526] The *New York Times* ran the entire opinion under the headline, "Supreme Court Supports Press on A Privacy Issue," as well as an editori-

521 *Id.*

522 GARMENT, *supra* note 5, at 109.

523 *Id.*

524 Smith, *supra* note 480, at 20.

525 John P. MacKenzie, *Court Restricts Newsworthy People in Damage Suits over False Reports*, WASH. POST, Jan. 10, 1967, at A1.

526 *Privacy and Press*, HARTFORD COURANT, Jan. 12, 1967, at 14. "The press does not seek the privilege of prying inordinately. But it does cherish the responsibility of being able to inform. Today more and more attempts are being made to hedge that responsibility roundabout. It is healthy and helpful not only to the press but the public when the Supreme Court clarifies issues as well as it did in this instance." *Id.*

al in which it praised Brennan for giving the press "breathing room" to "inform and criticize."[527] In a shamelessly self-congratulatory move, *Time* magazine published a piece titled "A Vote for the Press Over Privacy" in which it speculated that the ruling would eliminate many of the "nuisance" libel and privacy suits filed against it each year.[528] The President of Time, Inc. issued a public statement celebrating the Court for upholding the vital principle of a free press.[529]

While the press celebrated Brennan, Nixon prevailed in the court of public opinion. Popular reactions to the decision were almost wholly unfavorable. *Time, Inc. v. Hill* unleashed criticism in law reviews, academic journals, and popular publications.[530] As the *New York Times* noted, the *Hill* decision was "bound to disturb . . . Americans" at a time "when . . . circumscriptions on privacy are already omnipresent."[531] The Court had "cavalierly undercut a basic right—an action especially disturbing to many observers because it comes at a time when privacy is being increasingly threatened in a 'naked society.'"[532] The decision came down in an era of heightened sensitivity to privacy, and also against the backdrop of press criticism. With the rise of investigative journalism and bold coverage of Vietnam, civil rights, and anti-government protest, the media had become a major, opinionated force in political and social affairs. While many supported the press's powerful voice, there was also a feeling that media institutions were abusing their authority, engaging in needless sensation-

527 The *New York Times* gave extensive coverage to the decision, running excerpts of the opinion under the headline "Supreme Court Supports Press on A Privacy Issue." It also published an editorial praising the Court for giving the press "breathing room" to "inform and criticize." *Extending Press Freedom*, N.Y. TIMES, Jan. 11, 1967 at 24.

528 *A Vote for the Press Over Privacy*, TIME, Jan. 20, 1967, at 56.

529 *Id.* ("These rulings strike the concept of privacy a considerable blow, but 'freedom of discussion' takes priority, said Brennan.").

530 *See* George J. Alexander, *Torts (1969)*, 21 SYRACUSE L. REV. 677 (1969); Dwayne L. Oglesby, *Freedom of the Press v. The Rights of the Individual—A Continuing Controversy*, 47 OR. L. REV. 132 (1968); Comment, *Privacy, Property, Public Use, and Just Compensation*, 41 S. CAL. L. REV. 902 (1968); Eugene N. Aleinikoff, *Privacy in Broadcasting*, 42 IND. L. J. 373 (1967); Charles E. Friend, *Constitutional Law—Right of Privacy*—Time, Inc. v. Hill, 8 WM. & MARY L. REV. 679, 683–87 (1967); George D Haimbaugh Jr., *The Second Front: Free Expression Versus Individual Dignity*, 9 WM. & MARY L. REV. 126 (1967); W. Amon Burton Jr., Comment, Time, Inc. v. Hill, 45 TEX. L. REV. 758, 765 (1967); Comment, Time, Inc. v. Hill, 44 CHI.-KENT L. REV. 58, 63 (1967); Comment, *Privacy, Defamation, and the First Amendment: The Implications of* Time, Inc. v. Hill, 67 Colum. L. Rev. 926 (1967); Comment, *Publishers of Matters of Public Interest Not Liable Absent Finding of Knowing Untruth or Reckless Disregard of Truth in Right to Privacy Actions*, 18 SYRACUSE L. REV. 661 (1967); Philip L. Kellogg, Comment, *State Cannot Award Damages for Invasion of Privacy Without Proof of Malice*, 45 N. C. L. REV. 740 (1967); Comment, *Libel and Privacy Actions*, 81 HARV. L. REV. 160 (1967).

531 *Extending Press Freedom*, *supra* note 527.

532 Smith, *supra* note 480, at 20.

alism, taking dangerous liberties with the truth, and running roughshod over privacy.[533]

Leonard Garment believed that Americans saw the *Hill* decision as an example of the "arrogance of journalists and intellectual elites in riding heedless over the interests and values of more ordinary folk."[534] "To pardon the invasion of privacy of [James Hill]" "is to allow the massed power of the media to run unchecked against isolated and helpless individuals," wrote one law professor.[535] "Are we here simply, or largely, as spectators to be regaled and entertained by the misfortunes of our fellows as reported by the media of information, marvelous in their technological accomplishment?" asked legal scholar Willard Pedrick.[536] "Are the tragedy and heartbreak of individuals, who have sought no role in the direction of our society, to be the stuff served up to beguile the rest of us?"[537] The consequence of requiring private figures to prove actual malice, observed the *Texas Law Review*, was that "the press will be insulated from responsibility for the harms inflicted upon innocent persons."[538] "The fact that what allegedly happened to the Hill family was news should not in the name of the first amendment justify an obliteration of society's commitment to the values of privacy," wrote Melville Nimmer.[539] "By finding a constitutionally protectable right to privacy which could be balanced against rights of speech and press, the Court could have [preserved] . . . the true value of both rights," noted one law review.[540]

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533 *See* ARTHUR S. HAYES, PRESS CRITICS ARE THE FIFTH ESTATE: MEDIA WATCHDOGS IN AMERICA 18 (2008) (discussing the "social contract" between journalists and the public); Ben Bagdikian, *The American Newspaper Is Neither Record, Mirror, Journal, Ledger, Bulletin, Telegram, Examiner, Register, Chronicle, Gazette, Observer, Monitor, Nor Herald of the Day's Events*, ESQUIRE, Mar. 1967, at 128 (criticizing newspapers for including non-news material and sensationalist headlines); A.H. Raskin, *What's Wrong with American Newspapers*, N.Y. TIMES, June 11, 1967, at 249 (discussing the changing landscape of the news industry and its effect on news quality).

534 GARMENT, *supra* note 5, at 95.

535 Marshall S. Shapo, *Media Injuries to Personality: An Essay on Legal Regulation of Public Communication*, 46 TEX. L. REV. 650, 662 (1968).

536 Pedrick, *supra* note 195, at 402–03.

537 *Id.* at 403.

538 Burton, Jr., *supra* note 530, at 765; *see also* Richard A. Braun, *Discussion of Recent Decisions*, Time, Inc. v. Hill, 385 U.S. 374 (1967), 44 CHI.-KENT L. REV. 58, 63 (1967) (arguing that applying the standard of knowing or reckless falsehood to private figures "is clearly too severe"); *see generally Privacy, Defamation, and the First Amendment*, *supra* note 530 (examining the Supreme Court's consideration of the relationship between the First Amendment and the right of privacy in Time, Inc. v. Hill, and the implications of the Court's decision for future defamation cases).

539 Nimmer, *supra* note 250, at, 966.

540 Norbert F. Abend, Jr., Comment, Time, Inc. v. Hill, 18 SYRACUSE L. REV. 661, 666 (1967).

"[T]he preservation of innocent citizens' peace and happiness may merit such protection."[541]

Many were critical of Brennan's extension and seeming misapplication of the *Sullivan* rule. The Court's attempts to articulate "a coherent theory of the value of free speech" in *Sullivan*—"eloquently described precepts derived from the concept of self-government"—had "dissipated into a collection of vague and unsupported assertions," in the opinion of one law professor.[542] "[T]he Court in *Time* retreated to some vague notion of 'public interest.'"[543] "However absolute the freedoms of press and speech may be, the political settings in *New York Times* . . . presented a much greater need for free speech than did *Hill*."[544] *Hill*'s definition of newsworthy speech was seemingly so open-ended that it could cover just about anything.[545] "More than two years after their brief and highly unwelcome moment in the public eye, the Hill family was a 'matter of public interest' only because of the very *Life* magazine article about which they complained," observed the *Harvard Law Review*.[546] "[T]he Court's tests . . . make the press the arbiter of its own constitutional protection: by the very act of printing an article sufficiently sensational to arouse public interest, the press . . . insulate[s] itself from liability."[547] "[T]he logic of *New York Times* and *Hill* taken together grants the press some measure of constitutional protection for anything the press thinks is a matter of public interest."[548] In the view of some critics, the Court seemed to have unleashed the possibility of the complete takeover of public discourse by the press.

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Time, Inc. v. Hill's effects on the law were immediately felt. By the early 1970s, the decision had "touched a wide variety of cases, including cases involving false statements and those involving true state-

541 *Id.*

542 Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 642 (1982).

543 *Id.*

544 Kellogg, *supra* note 530, at 744.

545 Bloustein, *supra* note 200, at, 56 (noting the ambiguity of the term "newsworthiness" as it appears in privacy cases and literature); Burton, Jr., *supra* note 530, at 765 (arguing that free speech protection given to the press was so extensive that it threatened to "engulf much of the law of privacy").

546 *The Supreme Court, 1966 Term*, 81 HARV. L. REV. 112, 163 (1967).

547 *Id.*

548 Kalven, Jr., *supra* note 486, at 284; *see also* Peter B. Edelman, *Free Press v. Privacy, Haunted by the Ghost of Justice Black*, 68 TEX. L. REV. 1195, 1216 (1990) ("The Court assumed, with no discussion, that the matter was of public interest.").

ments," observed two professors in the *Washington Law Review*.[549] *Hill* limited liability for fictionalized invasions of privacy under the New York statute, and also common law privacy cases involving the publication of truthful private facts. Just as *Time, Inc. v. Hill* had made the public aware of the importance of legal protections for privacy, it sensitized judges throughout the country to the First Amendment implications of privacy actions involving the media.

Although *Hill*'s holding was limited to cases under the New York privacy statute, by describing newsworthiness as a category of constitutional proportion, the Court strengthened the news privilege in common law privacy cases. In the first few years after the decision, state courts deemed a wide array of material to be newsworthy and exempt from liability for invasion of privacy. An article about two children trapped in a refrigerator and suffocated was described as a matter of public concern, as was a story in the *National Enquirer* magazine about a murder-suicide, and an article in *Detective Publications* magazine about a murder entitled "House of Horror."[550] The newsworthiness privilege has become so expansive since *Hill* that the tort is today nearly moribund. Scholars have written "requiems" to the private facts tort, even describing it as "dead."[551] *Hill's* actual malice rule was also applied to the falsity requirement in "false light privacy" cases. The Supreme Court used *Hill*'s reckless disregard standard in its first false light case, *Cantrell v. Forest City Publishing*.[552]

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549 Pember & Teeter, Jr., *supra* note 96, at 65; *see also* Kellogg, *supra* note 530, at 747 ("Hill seems likely to limit considerably the future usefulness of 'privacy' as a tort.").

550 Cordell v. Detective Publ'ns, 419 F.2d 989 (6th Cir. 1969); Varnish v. Best Medium Publ'g Co., 405 F.2d 608, 611 (2d Cir. 1968); Costlow v. Cusimano, 34 A.D. 2d 196, 198 (N.Y. App. Div. 1970) .

551 *See* Samantha Barbas, *Death of the Public Disclosure Tort: A Historical Perspective*, 22 YALE J. LAW & HUMAN. 171, 172 (2010); Jonathan B. Mintz, *The Remains of Privacy's Disclosure Tort: An Exploration of the Private Domain*, 55 MD. L. REV. 425, 426 (1996) ("[M]ost of privacy academia have pronounced dead the more than century-old tort of public disclosure of private facts."); Diane L. Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort*, 68 CORNELL L. REV. 291, 294 (1983). In *Hill*, the Court has heard only a few cases involving the disclosure of private facts; in them, the Court decided for the press but limited its holdings, reserving judgment on the broader question of whether the publication of truthful material can ever be subject to liability consistent with the First Amendment. Bartnicki v. Vopper, 532 U.S. 514, 535 (2001) (focusing on the specific inquiry at issue of whether "a stranger's illegal conduct . . . suffice[s] to remove the First Amendment shield from speech about a matter of public concern"); Cox Broad. Corp. v. Cohn, 420 U.S. 469, 491 (1975) (declining to address the broad question of whether the State may carve out an area of privacy while still acting consistently with the First Amendment, and instead focusing on a narrower issue involving the relationship between the press and privacy).

552 Cantrell v. Forest City Publ'g, 419 U.S. 245, 252 (1974) (concluding that the District Judge's application of the "actual malice" standard articulated in *Hill* was correct).

Hill also influenced the law of libel. In the first few years after the decision, several lower courts read *Hill*, erroneously, to apply the *Sullivan* standard to libelous statements on any "matter of public concern."[553] Technically, *Hill* did not affect libel; *Sullivan* and two cases decided the same term as *Hill*, *Curtis Publishing Co. v. Butts* and *Associated Press v. Walker*, confirmed that the malice privilege in libel cases depended on the status of the plaintiff rather than the subject of the publication.[554] The media could take advantage of the "reckless disregard" standard only in libel cases involving public officials or "public figures" involved in "public affairs."[555]

In 1971, however, the Court brought reputation into parity with privacy. Extending *Hill* to the libel context, in *Rosenbloom v. Metromedia, Inc.*, an opinion by Justice Brennan held that the actual malice standard applied whenever the subject matter of the libel was a "matter . . . of public or general interest."[556] "If a matter is a subject of public or general interest, it cannot suddenly become less so merely because a private individual is involved, or because in some sense the individual did not 'voluntarily' choose to become involved," he wrote.[557] Yet three years later, in *Gertz v. Robert Welch*, the Court returned to the "status of the plaintiff" approach in defamation cases. Concluding that private persons, unlike public persons, have not voluntarily exposed themselves to enhanced risk of injury from defamatory falsehoods, *Gertz* adopted a minimum requirement of negligence for compensatory damages in libel cases involving private citizens.[558] Brennan dissented in *Gertz*, insisting that the proper accommodation

553 United Med. Labs., Inc. v. Columbia Broad. Sys., 404 F.2d. 706, 710–11 (9th Cir. 1968) (asserting that the application of the First Amendment to protect against potential liability caused by injury from publication or speech "has had substantial extension" since Sullivan); *see also* Bon Air Hotel, Inc. v. Time, Inc., 295 F. Supp. 704, 709 (S.D. Ga. 1969) (concluding that the Supreme Court's holding in *Sullivan* was applicable to resolving the issue of whether the record showed actual malice, and accordingly granting defendants' motion for summary judgment); Altoona Clay Prods., Inc. v. Dun & Bradstreet, Inc., 286 F. Supp. 899, 913 (W.D. Pa. 1968) (noting that lower courts have extended the Supreme Court's holding in Sullivan beyond situations concerning public officials, to cases involving public figures); All Diet Food Distribs. v. Time, Inc., 290 N.Y.S.2d 445, 448 (N.Y. App. Div. 1967) (dismissing the complaint on the grounds that the plaintiff failed to meet the *Sullivan* standard).

554 Curtis Publ'g Co. v. Butts, 388 U.S. 130, 134, 147 (1967).

555 *Id.*

556 Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 43 (1971).

557 Brennan's *Rosenbloom* opinion emphasized the broad scope of his category of "public or general interest": "the constitutional protection was not intended to be limited to matters bearing broadly on issues of responsible government," he wrote, citing *Hill*. *Rosenbloom*, 403 U.S. at 42.

558 Gertz v. Robert Welch, Inc., 418 U.S. 323, 345 (1974).

between "avoidance of media self-censorship and protection of individual reputations" demanded that the *Sullivan* standard apply to libel actions "concerning media reports of the involvement of private individuals in events of public or general interest."[559] After *Gertz*, some courts continued to apply *Hill* to the falsity requirement in "false light" privacy cases involving private figures, while others applied *Gertz*.[560] This latter approach, acknowledging a distinction in liability rules between public and private figures, essentially made Harlan's position in *Hill* governing law.

Since *Hill*, the Court has used the newsworthiness or "matters of public interest" concept to protect a range of speech in a variety of cases and contexts.[561] In *Pickering v. Board of Education*, a majority held that a public school teacher had a right to speak on issues of "public concern" without being dismissed unless knowing or reckless falsehood could be shown.[562] In *Connick v. Myers*, the Court indicated that the "matters of public concern" standard used to judge public employee speech was the same as in *Hill*.[563] A matter of "public concern is something that is a subject of . . . general interest and of value and concern to the public at the time of publication."[564] More recently, "matters of public concern" was invoked by the majority in its decision for the Westboro Baptist Church in the 2011 case *Snyder v. Phelps*.[565] The Court concluded that the Church's anti-gay funeral

559 *Id.* at 361 (Brennan, J., dissenting).

560 On the uncertainty around this issue, see Justice Powell's concurring opinion in *Cox Broad. Corp*, 420 U.S. at 498, n.2 (noting that courts' application of *Gertz* "calls into question the conceptual basis of Time, Inc. v. Hill") and Justice Stewart's remarks in *Cantrell*, 419 U.S. at 250–51 (declining to resolve whether the Court's standard in *Hill* applied to all false-light cases). Section 652E of the Restatement (Second) of Torts (1977) retains the *Hill* approach. *See* RESTATEMENT (SECOND) OF TORTS § 652E (1977) (providing that a person who casts another in a false light, by means of publicity, is liable if that person had knowledge of or acted in reckless disregard as to the falsity of the matter).

561 Cynthia L. Estlund, *Speech on Matters of Public Concern: The Perils of an Emerging First Amendment Category*, 59 GEO. WASH. L. REV. 1, 1 (1990).

562 Pickering v. Bd. of Educ., 391 U.S. 563, 574 (1968) (holding that a teacher could not be terminated in the absence of proof that he had made false statements knowingly or recklessly).

563 *See* Connick v. Myers, 461 U.S. 138, 143 n.5 (1983) (citing *Hill* for the purposes of explaining the standard used to determine whether a matter is of "legitimate concern to the public"). When a majority upheld the firing of an assistant district attorney in *Connick* for circulating a questionnaire on co-workers' attitudes towards employment policies, Justice Brennan dissented, stating that the majority had defined "public concern" too narrowly: "[t]he Court's narrow conception of which matters are of public interest is . . . inconsistent with the broad view of that concept articulated in our cases dealing with the constitutional limits on liability for invasion of privacy." *Id.* at 165 n.5.

564 City of San Diego v. Roe, 543 U.S. 77, 83–84 (2004).

565 131 S. Ct. 1207 (2011).

picketing, however hateful, involved speech that could be "fairly considered as relating to any matter of political, social, or other concern to the community," that was "a subject of legitimate news interest."[566]

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In helping free the media from liability in invasion of privacy actions, *Hill*, like *Sullivan*, emboldened the press. While the increase in media sensationalism in the past fifty years has many causes beyond the Supreme Court's decisions, legal scholars and media commentators have suggested that that the law's expanding protections for the press—*Sullivan* and its "progeny"—encouraged greater risk-taking among journalists, both for good and for ill.[567] In Leonard Garment's view, *Hill* led journalists to believe that the "First Amendment's writ ran without limit."[568] Had the *Hill* decision gone the other way, one lawyer opined, "the excessive tabloidism of the 1980s and 1990s" might have been stemmed.[569]

One of the most eminent observers of the law and the press, the *New York Times*' Supreme Court journalist Anthony Lewis, attributed the media's cavalier attitudes towards privacy, in part, to *Time, Inc. v. Hill*. For decades, Lewis, a noted free speech advocate, wrote and spoke extensively about the case, maintaining that the decision was wrong; "if your life is ruined by the press, you should have some kind of recourse," he told a public audience in 2008.[570] As Lewis wrote in 1997, Brennan's tacit dismissal of privacy was just too simple. "In a world that has known Orwell's Big Brother, and that now lives with electronic networks tracking our lives, many would resist the proposi-

566 *Snyder*, 131 S. Ct. at 1216.

567 *See* William P. Marshall & Susan Gilles, *The Supreme Court, the First Amendment, and Bad Journalism*, 1994 SUP. CT. REV. 169, 207 ("[T]he Court has created a jurisprudence that too often encourages a trivial, lax, and sensationalistic press over a press that is devoted to the thorough and accurate investigation and reporting of matters of public import."); *see also* Gerald G. Ashdown, *Journalism Police*, 89 MARQ. L. REV. 739 (2006) (discussing the press's immunity from accountability in light of *Sullivan* and its progeny).

568 GARMENT, *supra* note 5, at 110.

569 ROBERT ELLIS SMITH, BEN FRANKLIN'S WEB SITE: PRIVACY AND CURIOSITY FROM PLYMOUTH ROCK TO THE INTERNET 252 (2004).

570 Midwinter Meeting, AM. LIBRARIES (2008). What did James Hill, a private person, have to do with the reason of *New York Times v. Sullivan* . . . and its lesson that the central meaning of the First Amendment is the right to criticize those who govern us? My answer is—nothing. I think the Court, in *Time, Inc. v. Hill*, applied the compelling logic of *Sullivan* in a situation where it was quite inapposite. *See* Anthony Lewis, *The Sullivan Decision*, 1 TENN. J. L. & POL'Y 135, 148 (2004); *see also* LEWIS, *supra* note 5, at 184–85 (distinguishing *Hill* from *Sullivan*).

tion that 'exposure of the self to others' is a necessary part of living in a 'civilized community.'"[571]

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For Earl Warren, *Time, Inc. Hill* represented a failure. Warren had long believed in the importance of curbing certain kinds of harmful speech, such as obscenity, in the interest of the social good, and he was disturbed that he had been unable to persuade the Court to follow his views in *Hill*.[572] Fortas also remained bitter about the case. Many years later, he told Leonard Garment that no case during his time on the Court had affected him so much, or so offended his sense of justice.[573] "It was a bad result, and terribly unfair to the Hill family. I offer you my apologies for not being more effective," Fortas said to Garment.[574]

Hill cursed Fortas in other ways. In 1968, Warren was resigning, and a departing President Johnson had tried to put Fortas in the position to avoid the possibility of a Nixon appointment.[575] But Fortas was undone by a series of financial scandals, fueled in part by an article in *Life* exposing a secret fee he had accepted from a corrupt financier—said to be payback for his position in *Hill*.[576] Fortas resigned from the Court amidst scandal, and President Nixon appointed Warren Burger Chief Justice.[577] In 1969, on the last day Warren appeared on the Court before his retirement, Nixon gave an unprecedented address to the Court by a sitting president.[578] He joked that based on his arguments before the Court in *Hill*, the only thing more harrowing than a presidential press conference was an argument before the Supreme Court.[579]

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571 Anthony Lewis, *The Press: Free But Not Exceptional*, *in* REASON AND PASSION: JUSTICE BRENNAN'S ENDURING INFLUENCE 58 (E. Joshua Rosenkranz & Bernard Schwartz eds., 1997).

572 NEWTON, *supra* note 358, at 477.

573 To Warren and Fortas, Garment observed, the case was not so much about free speech or privacy as it was about "nontechnical justice—two ordinary American parents touched by near-tragedy and trying to shield themselves and their five young children from the cheapening effects of unwanted and distorted publicity." GARMENT, *supra* note 5, at 109.

574 *Id.* at 107.

575 *See* BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN: INSIDE THE SUPREME COURT 10 (1979).

576 KALMAN, *supra* note 365, at 361–62.

577 GARMENT, *supra* note 5, at 109.

578 Graham, *supra* note 350, at 178.

579 *Id.*

Despite the Court's unfavorable judgment in *Hill*, the case emboldened Nixon. The praise he won for his oral argument was empowering and encouraging to him. According to a biographer, "Nixon's appearance before the Supreme Court marked the zenith of his legal career. In his own mind he had now proved himself on the fast track of the New York bar. This made him feel ready to return to the even faster track of national politics."[580] Although Nixon and his impromptu "campaign team" at Mudge had been laying the foundations for a presidential run since 1965, Nixon, chronically insecure, remained doubtful about his prospects. *Hill* helped him find the confidence he needed to announce his 1968 presidential bid. One of the major themes in Nixon's campaign was his opposition to the Warren Court, especially Earl Warren, whom he criticized for his liberal stance on civil rights and civil liberties. Nixon famously accused Warren of "coddling criminals."[581] In 1968 Nixon won a narrow victory over Hubert Humphrey, carrying 32 states.[582]

Right after the decision in *Hill*, Nixon had told reporters that he was "pleased" that the Court had upheld the privacy statute. "From this standpoint," he said, "the court's decision is a historic vindication of fundamental rights of the individual as against abuses of freedom of the press."[583] In reality, he was outraged and offended by the decision. Nixon felt he had lost his "war" on the press. As he said to Garment, "I always knew I wouldn't be permitted to win . . . against the press."[584] Nixon told Garment that he "never want[ed] to hear about the Hill case again."[585] Because the draft opinions and correspondence between the Justices were not made public until the 1980s, Nixon didn't know that he almost won the case.[586]

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580 AITKEN, *supra* note 290, at 314.

581 BELKNAP, *supra* note 357, at 256.

582 DARCY RICHARDSON, A NATION DIVIDED: THE 1968 PRESIDENTIAL CAMPAIGN 435 (2002).

583 Ronald J. Ostrow, *High Court Backs Press in False Report Cases*, L.A. TIMES, Jan. 10, 1967, at I7.

584 GARMENT, *supra* note 5, at 91.

585 *Id.* A discussion of the *Hill* case appeared in the White House tapes in the Watergate affair. "According to a transcript made by the House Judiciary Committee in its impeachment inquiry," Nixon's counsel, John Dean, had "said that the threat of a libel suit had had 'a very sobering effect on several of the national magazines,' making them think again before printing 'this Watergate junk.'" Nixon and Dean discussed *Sullivan*, and Nixon said that he recalled reading it "when we were suing Life, you know, for the Hills. When Life was guilty as hell." *See* LEWIS, *supra* note 5, at 188.

586 Bernard Schwartz published the draft opinions from the summer of 1966 in his book THE UNPUBLISHED OPINIONS OF THE WARREN COURT. *See, e.g.*, SCHWARTZ, UNPUBLISHED OPINIONS, *supra* note 5, at 245–64 (showing the Fortas draft opinion of the Court).